No. 87-2084-CFX
Status: GRANTED

Title: Norman Jett, Petitioner
v.
Dallas Independent School District

Docketed:
June 21, 1988

Court: United States Court of Appeals
for the Fifth Circuit

Vide:
88-214

Counsel for petitioner: Goetz,Vincent Shane

Counsel for respondent: Townend,David W., Schwartz,Leonard J.

Entry	Date	Note	Proceedings and Orders
1	Apr 15 1988		Application for extension of time to file petition and order granting same until June 4, 1988 (White, April 18, 1988).
3	May 18 1988		Further extension filed.
4	May 19 1988		Further extension granted to and including June 14, 1988 by Justice White.
5	Jun 14 1988		Further extension filed.
6	Jun 14 1988		Further extension granted to and including June 21, 1988 by Justice White.
2	Jun 21 1988	G	Petition for writ of certiorari filed.
8	Jul 18 1988		Order extending time to file response to petition until August 20, 1988.
10	Aug 18 1988	X	Brief of respondent Dallas Independent School District in opposition filed.
9	Sep 7 1988		DISTRIBUTED. September 26, 1988
11	Oct 19 1988		REDISTRIBUTED. November 4, 1988
12	Nov 7 1988		The petition for a writ of certiorari in No. 87-2084 is granted limited to Question 1 presented by the petition. The petition for a writ of certiorari in No. 88-214 is granted. The case is consolidated with 88-214 and a total of one hour is allotted for oral argument. **********
13	Nov 21 1988		Petitioner/respondent Norman Jett will file the opening brief on the merits in Nos. 87-2084 and 88-214. Respondent/petitioner Dallas Independent School District will file the closing brief on the merits in Nos. 87-2084 and 88-214.
14	Dec 1 1988		Record filed.
		*	Certified copy of original record and proceedings, 11 volumes, box, received. (Vide: 88-214).
16	Dec 2 1988		Order extending time to file brief of petitioner on the merits until January 4, 1989.
17	Jan 4 1989		Brief amici curiae of NAACP Legal Defense and Educational Fund, et al. filed. VIDED.
18	Jan 4 1989		Brief amicus curiae of Natl. Education Association filed. VIDED.
19	Jan 4 1989		Joint appendix filed. VIDED.
20	Jan 4 1989		Brief or petitioner Norman Jett filed. VIDED.
21	Feb 3 1989		SET FOR ARGUMENT TUESDAY, MARCH 28, 1989. (1ST CASE)
22	Feb 3 1989		Brief of respondent Dallas Independent School District filed. VIDED.

No. 87-2084-CFX

Entry	Date	Note	Proceedings and Orders
23	Feb 3 1989		Brief amici curiae of Internatl. City Management Assn., et al. filed. VIDED.
24	Feb 21 1989		CIRCULATED.
25	Mar 6 1989	X	Reply brief of petitioner Norman Jett filed. VIDED.
26	Mar 28 1989		ARGUED.

No. 87-2084 A-802

Supreme Court, U.S.
FILED
JUN 21 1988
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NORMAN JETT,
Petitioner,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANK M. GILSTRAP
FRANK HILL
SHANE GOETZ
(Counsel of Record)
HILL, HEARD, ONEAL,
GILSTRAP & GOETZ
1400 West Abram Street
Arlington, Texas 76013
(817) 261-2222
Counsel for Petitioner

QUESTIONS PRESENTED *

1. Whether a public employee who claims job discrimination on the basis of race must show that the discrimination resulted from official "policy or custom" in order to recover under 42 U.S.C. § 1981.

2. Whether proof of a policy or custom of conscious indifference to possible racial discrimination in employee reassignment cases, promulgated by the final decisionmaker in such personnel matters, supports the imposition of municipal liability under 42 U.S.C. § 1983.

[NOTE: Petitioner reserves the right to argue Questions 3 and 4 in the event certiorari is granted on either or both of the above questions, but does not include Questions 3 and 4 among the reasons for the grant of certiorari.]

3. Whether a public employee serving under an employment contract possesses a property interest in the intangible, noneconomic benefits of his job itself, or only in his salary.

4. Whether the issue of constructive termination in a suit under 42 U.S.C. §§ 1981 and 1983 is a fact question for determination by the jury; if so, whether the Court of Appeals erred and exceeded its appellate authority in this case by reversing the jury finding of constructive termination, concluding "as a matter of law" that a reasonable person in the Petitioner's circumstances would not have felt compelled to resign.

* The Dallas Independent School District (hereafter "Dallas ISD") and Frederick Todd were defendants in the District Court and appellants in the Court of Appeals. Petitioner

subsequently settled his claims against Frederick Todd, and Mr. Todd has been dismissed as a party to these proceedings. App. 82 - 85A. Thus, the only remaining parties are Petitioner Norman Jett and Respondent Dallas ISD.

TABLE OF CONTENTS

Page

QUESTION PRESENTED 1

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 31

APPENDIX

A. OPINION OF THE COURT OF APPEALS (August 27, 1986) 1A

B. OPINION AND ORDER OF THE COURT OF APPEALS ON SUGGESTION FOR REHEARING EN BANC (February 5, 1988) 33A

C. MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT (December 10, 1984) 45A

D. AMENDED REFORMED JUDGMENT OF THE DISTRICT COURT (February 7, 1985) 64A

E. JUDGMENT OF THE COURT OF APPEALS (August 27, 1986) 66A

F. SUGGESTION FOR REHEARING EN BANC FILED IN THE COURT OF APPEALS 68A

G. COURT OF APPEALS' ORDER OF DISMISSAL OF DEFENDANT FREDERICK TODD (December 10, 1987) 82A

H. DISTRICT COURT'S ORDER OF DISMISSAL OF DEFENDANT FREDERICK TODD (November 18, 1987) 84A

I. ORDER EXTENDING TME TO FILE PETITION FOR WRIT OF CERTIORARI (April 18, 1988) 86A

J. ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI (May 19, 1988) 87A

TABLE OF AUTHORITIES

Page

Bhandari v. First National Bank of Commerce, 808 F.2d 1082 (5th Cir. 1987) 20

Bronze Shields, Inc. v. New Jersey Dept. of Civil Service, 488 F.Supp. 723 (D.N.J. 1980) 21

Burnett v. Grattan, 468 U.S. 421, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984) 11

Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) 24

Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979) 11, 21, 23, 24

City of St. Louis v. Praprotnik, __ U.S. __, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) 8, 11, 13, 17, 19, 26, 28, 30

City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985) 11, 28, 30

Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) 27, 28

Garner v. Giarusso, 571 F.2d 1330 (5th Cir. 1978) 15, 16, 28, 29

General Building Contractors Assn. v. Pennsylvania, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1985) 11, 13, 19, 26, 28

Goodman v. Lukens Steel Company __ U.S. __, 107 S.Ct. 2617, 6 L.Ed.2d 572 (1987) 11

Greenwood v. Ross, 778 F.2d 448 (8th Cir. 1985) . . 10
Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1985) 27
Johnson v. Railway Express Agency, 421 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1975) 12, 18, 24
Jones v. Alfred H. Mayer Co., 392 U.S. 454, 95 S.Ct. 1716, 44 L.Ed. 295 (1975) 13, 22, 24, 26, 27
Leonard v. City of Frankfort Electric and Water Plant Board, 752 F.2d 189 (6th Cir. 1985) . . 10
Mahone v. Waddle, 564 F.2d 1018 (3rd Cir. 1977), *cert. denied*, 438 U.S. 904, 98 S.Ct. 312, 57 L.Ed.2d 1147 (1978) 15, 20, 21, 23, 25, 28
McDonald v. Santa Fe Transportation Company, 96 S.Ct. 2574, 427 U.S. 273, 49 L.Ed.2d 493 (1976) 12
Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 26, 27, 28, 29, 30
Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) 12, 13, 15, 16, 17, 18, 21, 22, 27
Moor v. County of Alameda, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973) 24, 26
Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981) 11

Owen v. City of Independence, Missouri, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1981) 11, 18
Patterson v. McLean Credit Union, 108 S.Ct. 1419, 1988 USLW 35360 (April 25, 1988) 12, 22
Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) 27, 28
Pembaur v. Cincinatti, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) 8, 11, 25
Polk County v. Dodson, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) 11
Runyon v. McCrary, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) 12, 19, 20, 22, 23
Saint Francis College v. Al-Khazraj, 481 U.S. __, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987) 11
Sethy v. Alameda County Water Dist., 545 F.2d 1157 (9th Cir. 1976) 15, 20
Springer v. Seamen, 821 F.2d 871 (1st Cir. 1987) . . 10, 11, 17
Springfield v. Kibbe, 480 U.S. __, 107 S.Ct. 1114, 94 L.Ed.2d 293 (1987) 8, 30
Sullivan v. Little Hunting Park, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969) 17, 24
Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981) 10
Wells v. Dallas Independent School District, 793 F.2d 679 (5th Cir. 1987) 18

Statutes

42 U.S.C. § 1981 . . . . . 11, 14, 15,
. . . . . 16, 17, 18,
. . . . . 19, 21, 26,
. 27

42 U.S.C. § 1982 22

42 U.S.C. § 1983 . . . . . 14, 15, 16,
. . . . . 17, 19, 21,
. . . . . 23, 24, 25,
. . . . . 26, 27, 29

Treatises

Brennan, *Some Thoughts on the Supreme Court's Workload*, Judicature, Vol. 66, No. 6, December-January 1983 p. 230, 233 ("tolerable conflicts") 11

Kohl, *The Civil Rights Act of 1866, Its Hour Come Round At Last*, Vol 55, U. of Va. L. Rev. p. 272-293 (1969) 22

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

NO. A-802

NORMAN JETT,
Petitioner,

V.

DALLAS INDEPENDENT SCHOOL DISTRICT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Norman Jett v. Dallas Independent School District and Frederick Todd*, 798 F.2d 748 (5th Cir. 1986), supplemented on Petitioner's Suggestion for Rehearing *En Banc*, 837 F.2d 1244 (5th Cir. 1988).

OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Fifth Circuit is reported at 798 F.2d 748, and is reprinted *infra* at App. 1A. The order of the Fifth Circuit denying

rehearing, and supplementing its initial opinion, is reported at 837 F.2d 1244, and is reprinted at App. 33A. The opinion of the United States District Court for the Northern District of Texas, Dallas Division, is unreported and is printed *infra* at App. 45A.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 27, 1986. App. 1A. A timely petition for rehearing was denied on February 5, 1988. App 33A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides in pertinent part as follows:

> Congress shall make no law . . . . abridging the Freedom of speech . . . .

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1981 provides that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983 provides in pertinent part as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

1. The Facts

Norman Jett served thirteen years as teacher, head football coach, and athletic director at South Oak Cliff High School in Dallas. His teaching record was unblemished; his coaching record was superb. His teams dominated the Dallas high school football scene for years, and over two hundred fifty of his players earned college scholarships. Twenty-five of those went on to the National Football League.

In the spring of 1983 Jett was abruptly removed from his post at the insistence of his school principal, Frederick Todd. Although the District Court and the Fifth Circuit would later agree that Todd's reasons for removing Jett were racial in nature, it appears that something more complex than mere racial antipathy was at work. Todd's racial motives centered on the fact that Jett's South Oak Cliff football teams were all black, while most of the teams they competed against -- especially at the championship level -- were predominantly white.

In Texas, as in other states, the best high school football teams compete at season's end to become state champion. The competition is arduous and at times emotional, and there can be only one winner.

Jett's teams made several appearances in the playoffs, but none made it to the championship game. Jett's final game turned out to be a playoff confrontation with Plano High School, a perennial all white power, before a huge turnout in the Cotton Bowl. There, South Oak Cliff sustained a bitter defeat that deeply affected Principal Todd.

In the wake of the loss Todd decided to replace Jett as head coach. Despite all that Jett had done for South Oak Cliff, Todd apparently doubted that the school could become the first all black team to win the state championship so long as Jett remained at the helm. Todd believed that South Oak Cliff

would have to recruit young black athletes at the junior high school level[1] and he evidently believed that a successful recruiter would have to be black. He decided to replace Jett with a black coach.

Just after the Plano loss, Todd critized Jett for failing to follow the "game plan" and questioned him about rumors (utterly false) that he had been bribed to "throw the game". Soon afterward he gave Jett an unsatisfactory performance evaluation, the first Jett had received in twenty-six years with the Dallas Independent School District. In March, Todd summoned Jett to his office and summarily relieved him of his coaching/athletic director duties. Jett protested, and the final decision was ultimately made by Dallas ISD Superintendent Linus Wright.

Under Dallas ISD procedures, Jett's removal as coach/athletic director was viewed as a "reassignment". No loss of salary was contemplated. The Dallas ISD Board of Trustees had delegated complete authority to Wright to deal with all aspects of such reassignments; Wright's decisions were final and he had informally promulgated policies to deal with reassignment cases.

Wright cursorily reviewed the matter, first in separate conferences with Jett and Todd, and then with a hastily assembled group of Dallas ISD administrators. Jett told Wright of Todd's racial motives, but Wright disregarded Jett's protests. He resolved the dispute in his customary manner. Faced with an irreconcilable conflict between a principal and

---

1 Todd criticized Jett for not recruiting black middle school athletes, an unethical practice which is against Dallas ISD policy.

a teacher, Wright always "went with the principal". He did so in this case, even at the risk of upholding a personnel decision arising from unlawful racial motives. Thus, Jett was reassigned as a teacher at the Business Magnet High School, which had no athletic program, and Todd selected a new South Oak Cliff coach, a less experienced black man. SOC's coaching staff was now all black.

Jett did not fare well at his new assignment. He struggled emotionally and was reassigned to the Dallas ISD security department, where he finished the spring semester. Wright promised to give him the next available head coaching position and in the summer of 1983, such a position came open. By then, however, Jett had filed this suit against both Todd and the school district, and the coaching position went to someone else. Just before the beginning of the new school term (and football season), Jett was finally assigned to a coaching position as ninth grade track and football coach at Thomas Jefferson High School. Jett, who had been at the top of his profession, resigned rather than accept this humiliating demotion.

2. *The Proceedings Below*

The results of the litigation are detailed in the initial Fifth Circuit opinion. App. 5A. The Court of Appeals rejected Jett's § 1983 claim that he had been deprived of a property interest in his head coaching post without procedural due process,[2] and it set aside the jury finding that he had been constructively terminated.[3] This left only Jett's claims that he had been fired from his coach/athletic director position because of impermissible racial concerns and in retaliation for his comments to newspapers.[4]

Jett sought recovery under both 42 U.S.C. §§ 1981 and 1983. The First Amendment claim involved § 1983 only, while the racial claim sounded in both § 1983 (equal protection) and § 1981. The Court of Appeals upheld the liability of Todd[5] App. 13-19A but reversed as to the Dallas ISD. App. 19-31A.

---

2 The Court ruled that Jett had no property interest in his head coaching post, only in his salary which was not interrupted. App. 5-10A.

3 The panel concluded that Jett's "humiliation and embarrassment" at being told to report as a ninth grade coach were simply "not so difficult or so unpleasant". App. 12-13A.

4 Todd took offense to remarks attributed to Jett in the local press concerning the impact of new NCAA academic eligibility requirements on black high school athletes. App. 17-18A.

5 Ultimately the recovery against Todd was reversed and remanded on the issue of damages. App. 31-32A. Todd and Jett have since settled. App. 82-85A.

The Fifth Circuit disposed of Jett's § 1983 claims against the school district under part II of *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). After the Court of Appeals concluded that Wright was the "final decisionmaker" in Jett's case, it posed the question of whether he was also a "policy maker" as required by *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 1298, 89 L.Ed.2d 452 (1986). App. 21-23A.

Discussion on this point was pretermitted, however. The Court concluded that, even if Wright were a "policy maker", the mere fact that he had resolved the matter by mechanically applying his policy of always "going with the principal" would not be enough to satisfy *Monell*. The Fifth Circuit held that Wright's decision itself "must either have been based on Jett's race or Jett's exercise of his First Amendment rights." App. 24A.[6] Since the evidence as to Wright's state of mind was disputed, App. 25-26A, and since the school district attorneys had objected to the jury instruction, App. 24A, the § 1983 claims against the Dallas ISD were reversed and remanded.

Only Jett's § 1981 claim remained, and here the Fifth Circuit made the unprecedented decision to apply the *Monell* "policy or custom" requirement to that claim as well. Thus, both Jett's First Amendment claim and his racial discrimination claims were reversed and remanded. Jett moved for *en banc* rehearing, and seventeen months later the request was denied by way of a supplemental opinion. App. 33A.

6 Our second reason for seeking certiorari turns precisely on this point. *Cf. Springfield v. Kibbe*, 480 U.S. __, 107 S.Ct. 1114, 94 L.Ed.2d 293 (1987); and *City of St. Louis v. Praprotnik*, __ U.S. __, 108 S.Ct. 915, 936, 99 L.Ed.2d 107 (1988) (Brennan, J., concurring).

REASONS FOR GRANTING THE WRIT

I. THE ATTEMPT TO IMPOSE A "POLICY OR CUSTOM" REQUIREMENT IN CASES BROUGHT UNDER 42 U.S.C. § 1981 MUST BE REJECTED.

A. Summary

The Fifth Circuit's decision to impose the "policy or custom" requirements of *Monell* onto § 1981 poses enormous difficulties for the jurisprudence of both § 1981 and § 1983. Every other circuit that has addressed the issue has permitted some form of vicarious liability in § 1981 claims. The *Monell* requirement "arose from the language and history of § 1983"[7], and it makes little sense to apply it to a statute with a different language and history. Ultimately, the decision to engraft a "policy or custom" requirement onto § 1981 is a "policy decision", and on rehearing the Fifth Circuit defended its decision as a legitimate exercise in "judge made law". App. 42A. Because of the insidious nature of racial discrimination, imposition of a "policy or custom" requirement will effectively insulate local governments from liability under § 1981. Finally, the mixing of concepts from two independent and highly complex areas of civil rights jurisprudence threatens to make a shambles of both.

7 *City of St. Louis v. Praprotnik*, 108 S.Ct. at 923.

1. The Fifth Circuit decision conflicts with the decisions of other circuits on an important question of federal law.

In Part 2b of its original opinion, App. 26-31A the Court of Appeals held that a local government may be liable under § 1981 only upon proof of a "policy or custom", not on a basis of *respondeat superior*.[8] The First Circuit, in an opinion handed down between the two *Jett* opinions, expressly disagreed. *See Springer v. Seamen*, 821 F.2d 871, 880 [syl. 6, 7] & n. 10 (1st Cir. 1987). The *Springer* decision followed the earlier lead of at least two other circuits. *See, Leonard v. City of Frankfort Electric and Water Plant Board*, 752 F.2d 189, 194 n. 9 (6th Cir. 1985); *Greenwood v. Ross*, 778 F.2d 448, 456 (8th Cir. 1985); and *Taylor v. Jones*, 653 F.2d 1193, 1200 [syl. 5, 6] (8th Cir. 1981)[9]

8 At the outset we question the dichotomy between "policy or custom" on the one hand and "*respondeat superior*" on the other. There are, in fact, several forms of vicarious liability, and *respondeat superior* is only one of them. See part 4 of this argument.

9 These cases all involve claims against local governments. There are many other cases involving claims against private employers. See Suggestion for Rehearing En Banc App. 68A.

Unfortunately, *Jett* cannot be dismissed as a mere anomaly. In denying our request for *en banc* consideration, the Fifth Circuit noted *Springer* and expressly disagreed with it on this point. App. 43A n. 5. *Jett* is now Fifth Circuit law, and the conflict among the circuits is clear, irreconcilable, and ripe for resolution. *See, e.g., Burnett v. Grattan*, 468 U.S. 42[illegible], 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984), and *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979). *Cf.* Brennan, *Some Thoughts on the Supreme Court's Workload*, Judicature, Vol. 66, No. 6, December January 1983 p. 230, 233 ("tolerable conflicts").

The importance of this issue is obvious. No aspect of § 1983 jurisprudence has so perplexed this Court as the *Monell* requirement of "policy or custom,"[10] and cases involving 42 U.S.C. § 1981 have repeatedly come before the Court.[11] Indeed, the Court created something of a furor by its recent decision to reexamine the historical underpinnings of 42

10 *See, e.g., City of St. Louis v. Praprotnik*, __ U.S. __, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985); *Pembaur v. Cincinatti*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981); *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed. 673 (1980).

11 *See, eg., Saint Francis College v. Al-Khazraj*, 481 U.S. __, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987) (discrimination against Arab-Americans); *Goodman v. Lukens Steel Company*, ____ U.S. ____, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987) (statute of limitations for 1981); *General Building Contractors Association,*

(Cont. on pg. 12)

U.S.C. § 1981 as set forth in *Runyon v. McCrary*.[12] Moreover, the Fifth Circuit's decision to apply the *Monell* rules to § 1981 cases requires examination of the same historical material at issue in *Runyon*.

Finally, if further "importance" be needed, it can be found in the Fifth Circuit's express rejection of the historical methods that have guided this Court in its treatment of the Reconstruction era civil rights statutes since *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

2. The Court of Appeals opinion rejects the established historical approach of *Monroe* and *Monell*.

---

11 (Cont. from pg. 11) *Inc. v. Pennsylvania*, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982) (requirement of intentional discrimination under section 1981); *Johnson v. Railway Express Agency*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) (discrimination in private employment); and *McDonald v. Santa Fe Transportation Company*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976) (discrimination against whites).

12 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). *See Patterson v. McLean Credit Union*, 108 S.Ct. 1419, 1988 USLW 353[illegible] (April 25, 1988), *per curiam*.

Until now, analysis of problems arising under *Monell* has been based upon the "language and history of § 1983", *Praprotnik*, 108 S.Ct. at 923, and this method of historical analysis is fundamental to the jurisprudence of all of the Reconstruction era civil rights statutes.[13]

This historical approach, along with the modern civil rights era, began with *Monroe v. Pape*, where the Court held that "Congress did not undertake to bring municipal corporations within the ambit of [§ 1983]." *Monell*, 436 U.S. at 654, 98 S.Ct. at 2022. The "sole basis" for the *Monroe* court's conclusion was found in analysis of the legislative debates surrounding the passage of the Ku Klux Klan Act of 1871, and particularly the defeat of the proposed "Sherman Amendment". *Id.*

Seventeen years later in *Monell* the Court reconsidered whether local governments could be liable under § 1983. The Congressional debates concerning the Sherman Amendment were again subjected to detailed scrutiny, and *Monroe* was found to be flawed. "Congress *did* intend municipalities and other local government units to be included among those persons to whom 1983 applies." *Monell*, 436 U.S. at 690, 98 S.Ct. at 2035 (emphasis in original).

Although the *Monell* court reached a result contrary to *Monroe*, the emphasis on historical analysis remained unchanged. Indeed, it was in analyzing the debates over the Sherman Amendment that the Court discovered that Congress had intended to place an onerous limitation on municipal liability.

---

13 *See e.g., Monell* and *Monroe v. Pape*, (§ 1983); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 454, 95 S.Ct. 1716, 44 L.Ed. 295 (1975) (§ 1982); and *General Building Contractors Assn. v. Pennsylvania*, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1985) (§ 1981).

Local governments could not be held liable under a "*respondeat superior*" theory. 436 U.S. at 690, 98 S.Ct. at 2036. "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.*

a. The initial *Jett* opinion fails the test of historical analysis.

In endeavoring to extend the *Monell* "policy or custom" requirement to our § 1981 case, the Fifth Circuit initially embraced *Monell's* historical approach. The Court of Appeals wrote that Congressional intent "provides compelling reasons" for extending the *Monell* rule to § 1981 claims against public employers. App. 30A. Yet, no such historical analysis was performed, and not a single shred of historical material has ever been produced to justify the result of *Jett*.

The attempt to find historical justification for imposing a *Monell* requirement in § 1981 cases had to fail, of course. Section 1983 was passed by the 42nd Congress in 1871, while § 1981 was enacted by an earlier Congress.[14] The inherent difficulty of the Fifth Circuit's approach is evident from its conclusion: "To impose such vicarious liability for only certain wrongs based on § 1981 apparently would contravene the congressional intent behind section 1983." App. 29A.

---

14 Just which Congress enacted § 1981 continues to be a subject of controversy. While we deal with this issue in part 3 of this argument, the point is of no consequence at this juncture. Whatever the origins of § 1981, they are not to be found in the Ku Klux Klan Act of 1871, which was the subject of the Sherman Amendment debates.

Similar attempts to use § 1983 concepts to limit § 1981 claims had previously been rejected in the pre-*Monell* era. In *Monroe* this Court held that § 1983 did not reach local government entities at all. They were, in a manner of speaking, "immune" from liability under § 1983. In the late 1970's several attempts were made to extend this so-called "immunity" to claims against local governments made under § 1981. In every instance, they were rejected. Thus, in *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157, 1159 (9th Cir. 1976), the Ninth Circuit rejected the argument that the defeat of the Sherman Amendment somehow evidenced the legislative intent behind § 1981. The Third Circuit agreed in *Mahone v. Waddle*, 564 F.2d 1018, 1031 (3rd Cir. 1977), *cert. denied*, 438 U.S. 904, 98 S.Ct. 312, 57 L.Ed.2d 1147, (1978), an opinion that delved deeply into the history of § 1981. *Cf.* 564 F.2d 1030-1037, with 1037-1065 (Garth, J., dissenting). These cases were summarized by the Fifth Circuit in *Garner v. Giarusso*, 571 F.2d 1330 (5th Cir. 1978), a case which is factually indistinguishable from *Jett*. App. 35-37A.

In *Garner*, after examining the legislative history of § 1981, the Fifth Circuit could find "nothing comparable to the rejection of the Sherman Amendment and nothing else to support an exclusion of municipalities from the reach of [sec. 1981]." 571 F.2d at 1340.

In seeking *en banc* consideration, we asked the Fifth Circuit to tell us just how the substitution of *Monell* for *Monroe* had changed its analysis of *Garner*. The Fifth Circuit responded by attempting to make the facts of *Garner* fit the requirements of *Monell*. App. 35-37A. It chose to ignore, however, the historical difficulties which had been recognized in *Garner* and the other pre-*Monell* cases. Those cases were dismissed as arising during "the reign of *Monroe v. Pape*", and their reasoning was said to have somehow "evaporated" with the advent of *Monell*. App. 35A.

Yet, while this kind of argument may have helped the panel avoid *Garner* as binding precedent,[15] it did nothing to advance the thesis of the original *Jett* opinion, i.e., that the decision to impose the "policy or custom" requirement onto § 1981 could be justified under the rigorous historical methods of *Monroe* and *Monell*. Ultimately the attempt was simply abandoned,[16] and the Fifth Circuit's decision to engraft the "policy or custom" requirement of *Monell* onto §1981 remains, in the words of *Garner*, "wholly without support in either the Supreme Court's § 1983 cases, the wording of § 1981, or its legislative history." 571 F.2d at 1339.

b. In its opinion on rehearing, the Court of Appeals abandoned the historical method in favor of policy arguments.

---

15 One panel of the Fifth Circuit cannot overrule an earlier panel decision. App. 78A.

16 The only attempt at some kind of historical analysis is a vague reference to "then perceived constitutional problems." App. 43A. Yet, the only "then perceived constitutional problem" found in *Monell* and *Monroe* was that of imposing an "obligation" on local governments to enforce the law. *Monell*, 436 U.S. at 664-665, 98 S.Ct. at 2022-2023. Of course, the whole purpose of Part I of *Monell* was to demonstrate that this problem was quite different from the problem of imposing "civil *liability* on municipalities", 436 U.S. at 665, 98 S.Ct. at 2022 (emphasis added), and that *Monroe's* reliance on this "perceived constitutional problem" was misplaced.

Unable to find historical support for its decision, the Court of Appeals turned to the other guidepost in this difficult area: statutory language. Section 1983 imposes liability on any "person" who "subjects or causes [another] to be subjected to" a constitutional deprivation. *Monroe* had held that a local government was not a "person". *Monell* changed that, but it then invoked this very causation language to support its requirement of proof of "policy or custom".[17]

Of course, this case involves § 1981, not § 1983. On rehearing the Fifth Circuit examined the language of § 1981 and concluded that "section 1981 contains no language creating *any* liability". App. 38A (emphasis in the original). At this juncture the Court shifted its inquiry. The issue was no longer the nature of § 1981 liability; instead it became the existence *vel non* of any liability. The Court said it was "aware of no specific legislative history of section 1 of the 1866 Civil Right Act indicating an intent to impose municipal liability",[18] App. 41A, and it cited *Sullivan v. Little Hunting Park*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969), where this Court had concluded that the existence of a statutory right in § 1982 "implies all necessary and appropriate remedies." 396 U.S. at 239, 90 S.Ct. at 405.

Ultimately, the Fifth Circuit appears to conclude that the *Sullivan* decision, along with *Johnson v. Railway Express Agency*,

---

17 This Court continues to emphasize that the "policy or custom" requirement arises from the notion of causation. *See Praprotnik*, 108 S.Ct. at 923, and compare *Springer v. Seaman*, 821 F.2d at 876.

18 The Court equated § 1981 with section 1 of the Civil Rights Act of 1866, but see part 3 of our argument.

Inc., 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975), amounted to nothing more than "judge made law." App. 41A. Thus the Court reaches its conclusion. Henceforth, in construing § 1981, the Fifth Circuit will rely "more on general considerations of likely legislative intent or on judge made law than on specific, express legislative history or statutory language". App. 41A. The enormous significance of this statement should be obvious.

Freed from the strictures of history and language, the Court considers policy arguments, and it finds a suitable policy in the language of *Owen v. City of Independence*. "[W]hen it is the local government itself that is responsible for the constitutional deprivation -- it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government." 100 S.Ct. at 1418 n. 39. Thus, the decision to import *Monell* wholesale into the law of § 1981 is ultimately founded upon concern for the public treasury.[19] While the Court is candid in resorting to policy arguments, problems are immediately apparent. For example, this Court expressly rejected use of this very same "policy consideration", i.e., concern for the municipal treasury, as a basis for deciding both *Monroe*, 365 U.S. at 191, 81 S.Ct. at 495, and *Monell*, 436 U.S. at 664 n. 9, 97 S.Ct. at 2022 n. 9. We suggest that the Court of Appeals should have looked deeper into legislative history before making its momentous decision to jettison the established methodology of *Monroe* and *Monell*.

---

19 *Cf. Wells v. Dallas Independent School District*, 793 F.2d 679 (5th Cir. 1987), submitted and argued simultaneously with *Jett*.

3. Historical analysis reveals that Congress did intend to allow liability on a respondeat superior basis under § 1981.

At issue is the construction of § 1981. We search for guidance in the "language and history"[20] of the statute.

a. Congressional debates

The Fifth Circuit analyzed Congressional debates, but they were the wrong ones. Instead of seeking Congressional intent in the debates that accompanied § 1983, it should have canvassed the debates of the earlier Congress that passed § 1981. Until recently we were confident that this was the 39th Congress which passed the Civil Rights Act of 1866. This was the teaching of *Runyon v. McCrary*, 427 U.S. at 168, 170, and the subsequent cases cited at App. 72A n. 3. Of course, the debates of the 39th Congress in 1866 had been explored at length in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 454, 90 S.Ct. 1716, 44 L.Ed.2d 295 (1975). Using these and the further analysis of those same debates in *General Building Contractors*, we were able to reveal serious flaws in *Jett's* approach to the problem. App. 56-78A.

---

20 *Praprotnik*, 108 S.Ct. at 923.

This would suggest a canvass of the 1866 debates with an eye to vicarious liability questions, even though similar inquiries in the pre-*Monell* era produced little in the way of useful material.[21]

Now, as everyone knows, the legislative history of § 1981 has again been clouded. This Court has decided to reconsider its *Runyon* decision with an eye toward reexamining whether § 1981 reaches private conduct. It appears possible that the position of the *Runyon* dissent may at long last carry the day. *Cf. Bhandari v. First National Bank of Commerce*, 808 F.2d 1082 (5th Cir. 1987), *rev'd*, 829 F.2d 1343 (1987) (en banc). If that occurs, then § 1981 will be traced back, not to Section 1 of the Civil Rights Act of 1866, but to Section 16 of the 1870 Voting Rights Act, which became in turn section 1977 of the Revised Statutes of 1874. *Runyon* 427 U.S. at 195 n.6 (White, J., dissenting).

This, in turn, suggests a canvass of the debates of the 41st Congress which passed the Voting Rights Act. The Fifth Circuit apparently undertook such a canvass while our suggestion for *en banc* rehearing was pending in *Jett*. See *Bhandari, supra*. The fact that none of this material found its way into the *Jett* opinions gives us at least some assurance that there is nothing in the 1870 debates that might shed light on our problem. *See also, Bronze Shields, Inc. v. New Jersey Dept. of*

---

21 Judge Garth apparently made such a canvass in his *Mahone* dissent to support his contention that the 39th Congress "never contemplated that section 1 of the Act would furnish a private cause of action cognizable in federal courts." *Mahone v. Waddle*, 564 F.2d at 1038. Judge Sneed undertook a similar, though less adversarial, review in his concurring opinion in *Sethy v. Alameda County Water Dist.*, 545 F.2d at 1163 n.1.

Civil Service, 488 F.Supp. 723, (D.N.J. 1980). Because of the present confusion on this point we believe that such a canvass is not necessary to this Court's consideration of our petition for certiorari.

b. Statutory Language

(i) Congress did not intend to provide for a "policy or custom" requirement in § 1981.

While much has been written concerning the origins of § 1981, there is no similar controversy concerning § 1983. All agree that § 1983 originated as section 1 of the Ku Klux Klan Act of 1871. It is also settled that section 1 of the 1871 Act was, in turn, modeled after section 2 of the Civil Rights Act of 1866.[22] *See Monell*, 365 U.S. at 185, and *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 n. 34, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979), and 441 U.S. at 628 (Powell, J., concurring) and 441 U.S. at 652 n. 12 (White, J., concurring). Certainly the language of the two statutes is almost identical and, when, in *Monroe v. Pape*, Justice Douglas sought the meaning of the phrase "under color of [state law]" in § 1983, he turned to earlier cases that construed the same phrase in 18 U.S.C. § 242. Section 242 is, of course, the modern codification of section 2 of the 1866 Act. *Monroe*, 365 U.S. at 183.

The fact that the "color of law" language was present in section 2 of the 1866 Act, but not in section 1, was also crucial to the holding, in *Jones v. Alfred H. Mayer Co.*, that 42 U.S.C. §1982 reaches private conduct. 392 U.S. at 424-426 & nn. 32-33.

---

22 The complete text of the Civil Rights Act of 1866 appears as an Appendix to *Mahone*, 564 F2d 1062-1065.

While our arguments involve much of the same material at issue in *Runyon* (and probably in *Patterson v. McLean Credit Union*), Jett was a public employee, and we therefore need not concern ourselves with the "incorporation" question which appears so important to the *Runyon* debate. *See generally*, Kohl, *The Civil Rights Act of 1866, Its Hour Come Round At Last*, Vol. 55, U. of Va. L. Rev. pp. 272-293 (1969).

While our case does not involve private conduct, it does involve language that originated in section 2 of the 1866 Act, namely the phrase "shall subject or cause to be subjected." This is, of course, the crucial language of part II of *Monell*, and its presence in § 1983 was the basis of *Monell's* conclusion that local governments could be held liable under § 1983 only for an "injury inflicted" by "execution of a government's policy or custom." 436 U.S. at 690-695.

Thus, the *Monell* language was present in the Civil Rights Act of 1866, but only in a section which provided for criminal liability. The inference is strong, therefore, that Congress intended to impose a "policy or custom" requirement only where criminal liability was involved.[23]

---

23 This argument also works under the view of the *Runyon* dissent. According to Justice White, § 1981 originated, not as section 1 of the Civil Rights Act of 1866, but as section 16 of the Voting Rights Act of 1870. *Runyon*, 427 U.S. at 195 n. 6 (White, J., dissenting). Yet that section, like section 1 of the 1866 Act, contains no "shall subject or cause to be subjected to" language, while section 17 does. *Id.*, 427 U.S. at 201 n. 9. Of course, section 17 was the reenactment of section 2 of the 1866 act. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. at 651 (White, J., dissenting).

It is not necessary to our argument that we also demonstrate that Congress intended to provide a civil remedy in the 1866 Act. Regardless of where one discovers the origin of the right to sue for damages under § 1981, it clearly did not come from a statute containing the phrase "shall subject or cause to be subjected". Therefore the notion that Congress intended to write a *Monell* requirement into § 1981 makes no sense.

Admittedly, our argument is more persuasive if we can conclude that Congress intended to provide for a civil remedy in the 1866 statute itself. In fact, such a remedy is provided for in the plain language of section 3 of the 1866 Act. Note also that language in Section 1 of the Ku Klux Klan Act of 1871, which expressly spoke of "like cases" arising under the 1866 Act. *See Mahone v. Waddle*, 564 F.2d at 1032-1033. *Contra, Id.*, at 1038-1041 (Garth, J., dissenting). Justice Powell, for one, found this view "plausible." *Cannon v. University of Chicago*, 441 U.S. 677, 735 n. 7, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (Powell, J., dissenting).[24]

---

24 Again, this argument also stands up under the view of the *Runyon* dissent, since section 3 of the 1866 act "was reenacted as section 18 of the 1870 Act." *See Chapman*, 441 U.S. at 654-655, 99 S.Ct. at 1935 (White, J., dissenting).

In making this argument, it is not necessary to argue that a modern descendent of section 3 of the 1866 act somehow served as a basis for the § 1982 and § 1981 causes of action allowed a century later in *Jones v. Alfred H. Mayer Co., Sullivan v. Little Hunting Park, and Johnson v. Railway Express Agency.*[25] We are seeking the intent of the Congress when it enacted 42 U.S.C. § 1981. Regardless of whether that Congress was the 39th Congress enacting the Civil Rights Act of 1866 or the 41st Congress enacting the Voting Rights Act of 1870, the fact remains that, when the statute was originally enacted, the phrase "subjects or causes to be subjected to" appeared only in the part of the statute providing for criminal penalties.[26] It is also quite plausible, as we have seen, that the same Congress simultaneously intended to provide for a private cause of action to enforce the new statue by enacting section 3, which did not contain this phrase.[27]

Thus, Congress could not have intended for the phrase "subjects or causes to be subjected to" to apply to a private cause of action brought under 42 U.S.C. § 1981. Therefore, it also could not have intended to impose a *Monell*-style "policy or custom" requirement in § 1981 cases.

---

25 The original 1866 section 3 underwent extensive amendment. Part of it, for example, became § 1988, at least under the view taken by the Court in *Moor v. County of Alameda*, 411 U.S. 693, 705, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973). Justice White, on the other hand, has concluded that the section was simply deleted in the 1874 codificdation of the federal statues. *See Chapman*, 441 U.S. at 654-655, 99 S.Ct.at 1935 (White, J., dissenting), a view consistent with his Runyon dissent. 427 U.S. at 207, 96 S.Ct. at 2612.

26 Section 2 of the 1866 Act; section 17 of the 1870 Act.

27 Section 3 of the 1866 Act; section 17 of the 1870 Act.

ii. Construction of the statutes consistent with then - existing common law principles.

Absent specific provisions to the contrary, this Court is required to construe the Reconstruction era civil right laws in accordance with common law principles as they existed at the time. *See Pembaur*, 106 S.Ct. at 1309-01, & nn. 12, 13 (Stevens, J., dissenting). Congress mandated such construction in section 3 of the Civil Rights Act of 1866, the last sentence of which read as follows:

> The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States so far as such laws are suitable to carry same into effect; but *in all cases where such laws are not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies* and punish offenses against the law, *the common law*, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, *shall be extended to and govern said courts in the trial and disposition of such cause*, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

Mahone, 64 F.2d at 1063 (emphasis added). "This latter portion of section 3, which has become § 1988 and has been made applicable to Civil Rights Acts generally, was obviously intended to do nothing more than to explain the source of the law to be applied in actions brought to enforce the substantive provisions of the [1866] Act, including section 1." *Moor v. County of Alameda*, 411 U.S. at 706, 93 S.Ct. 1793. *Cf. Jones v. Alfred H. Mayer Co.*, 392 U.S. at 422-437, and *General Building Contractors*, 458 U.S. at 408 (Brennan, J., dissenting) (1866 Act to be construed broadly).

Of course, the principle of *respondeat superior* was well established in the common law by 1866, as Justice Stevens has ably demonstrated in the past. *See Praprotnik*, 108 U.S. 937 at n. 4 (Stevens, J., dissenting), and cases there cited. Of course, the Court has steadfastly refused to retreat from *Monell*, where the phrase "subject or cause to be subjected" can be viewed as a "specific statutory provision" modifying the general *respondeat superior* rule. Since, as shown above, no such language was even included in § 1981, the common law concept of *respondeat superior* should apply.

One final historical argument can be made. Everyone agrees that § 1981 was intended to deal with racial discrimination, and the insidious nature of racial discrimination was as well understood by the 39th Congress, *Jones*, 392 U.S. at 428-429, as it is today. *Id.* at 444-449 (Douglas, J., concurring). Congress must have understood that to curtail the operation of the then established rules of *respondeat superior* would make the 1866 Act useless as a civil remedy. (Indeed the *Monell* requirements have emasculated § 1983 in the modern era). Of course, the imperatives of the historical method decree the *Monell* rule in § 1983 cases, but these factors are simply not at work in § 1981 cases and to somehow infer them, as the Fifth Circuit has attempted to do, would be "to seek ingenicus

analytical instruments" to carve an exception from the statute that simply was never intended. *Jones*, 392 U.S. at 437.

4. Limiting § 1981 *respondeat superior* liability to the actions of supervisory officials offers a workable method of limiting local government liability under § 1981, if such a limit is necessary.

Ultimately the factors at work in the Court of Appeals seem easy to understand. This was in part a § 1983 case and, since this Court handed down *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), it has grappled with the need to find a "logical stopping place" for § 1983 liability and to avoid "federalizing" the law of torts. *Id.* at 424 U.S. 698-699. Thus, the Court has developed doctrines that severely limit the ability of § 1983 plaintiffs to recover in federal court. Cases like *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), and *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) exemplify this trend, and *Monell* can be viewed in that way as well, even though it seemed to represent a significant relaxation of the municipal "immunity" of *Monroe v. Pape*.[28]

Thus, in retrospect, the ease with which the Fifth Circuit carved up Jett's § 1983 claim was no surprise. The surprise was the Fifth Circuit's decision to deal with Jett's § 1981 claim in the same way, even down to using the same rule of law.

---

28 This liberalization was more theoretical than practical, and the requirement of "policy or custom" is in most cases extremely difficult, if not impossible, to satisfy.

Section 1981 is not the same as § 1983. The former contains broad language that is not easily limited, as the Court understood in *Paul v. Davis*. On the other hand "[t]he scope of § 1981 is much narrower than that of § 1983. It protects only against discrimination on the basis of race or lineage (citations omitted), and deals only with the protection of a limited range of civil rights, including the right to make and enforce contracts."*Garner v. Giarusso*, 571 F.2d at 1340. Moreover, the Court has limited the scope of § 1981 even further by reading an "intent" requirement into it. *See General Building Contractors*, 102 S.Ct. at 3146-3150. On the other hand, "state of mind" remains an open question where § 1983 is concerned. *See Daniels v. Williams*, 106 S.Ct. at 667 n.3.

Yet, judging from *General Building Contractors*, some members of the Court may view § 1981 as a statute also in need of limits, though certainly these limits would have to be found in the history and language of § 1981, just as the "policy or custom" requirement of *Monell* came from those same sources in § 1983.

If this is so, then the Court can profit from its decade of struggle with *Monell*. We now understand that all governmental liability is in a sense vicarious since governments must act "through human agents". *Praprotnik*, 106 S.Ct. at 931 (Brennan, J., concurring). There are, in fact, many approaches to vicarious liability, and there is simply no need to make an all or nothing choice between the "policy or custom" requirement of *Monell* on the one hand, and the "broad vicarious liability" suggested by the dissent, on the other. *City of Oklahoma City v. Tuttle*, 105 S.Ct. at 2434, n.5. Indeed, the solutions to the *Monell* problem put forward by the concurrence and the dissent in *Praprotnik* represent attempts to find a more workable solution to the problem of vicarious liability under § 1983, while working within the structures of *Monell*.

Here, of course, the requirements of *Monell* are not present, and there is a better way of limiting liability under § 1981 than by importing *Monell* and all its complexity into the jurisprudence of § 1981, an area that is already intricate enough. We suggest that the Court could do far worse than to adopt the approach of *Garner v. Giarusso*, 571 F.2d 1330. There, the Fifth Circuit drew a logical distinction between a city's liability for the acts of its supervisors, on the one hand, and liability for the acts of its mere "servants", on the other. 571 F.2d at 1338-1341. This same solution has proved most sensible and workable under Title VII.

II. DALLAS ISD LIABILITY UNDER 42 U.S.C. § 1983

The Fifth Circuit correctly noted that the jury instruction did not require proof of "official policy or custom" as a prerequisite to governmental liability. App. 20-21A & n. 8. The District Court avoided the problem by finding that "policy or custom" was proven as a matter of law.

It was undisputed that the Board of Trustees of the Dallas ISD had delegated final, nonreviewable decision-making authority to Superintendent Wright in personnel matters involving "reassignment". Jett's removal as athletic director/head football coach was treated as such a "reassignment". Wright had promulgated his own unwritten policies to deal with "reassignment" cases. One such policy was very simple: in situations involving irreconcilable conflict between an employee and his school principal, Wright always "went with the principal". Wright followed this policy in Jett's case, resulting in Jett's "reassignment."

Wright's policy of avoiding conflict where there is a dispute between a principal and employee may not, in and of itself, be unconstitutional. Still, in Jett's case this policy undoubtedly caused a constitutional violation.

It was undisputed that Jett alerted Superintendent Wright to Todd's racial motives. Jett told Wright that he believed Todd wanted to get rid of him in order to replace him with a black coach. Nevertheless, Wright chose not to look into the matter. Instead, he resolved the dispute by adhering to his policy of avoiding conflict by "going with the principal." As the jury found, Wright affirmed Todd's recommendation without undertaking any independent investigation, and Wright's decision was based solely on Todd's recommendation. The Court of Appeals was incorrect in its repeated statements that here was no evidence that Wright knew, believed, *or was consciously indifferent to whether* Todd's recommendation was racially motivated. App 25A. Although Wright may not have believed, or known for a fact, that Todd was racially motivated, Wright clearly was consciously indifferent to that possibility. Jett *told* Wright of Todd's suspected racial motive, yet Wright did *nothing* to investigate it, choosing instead to follow his policy of avoiding conflict between principal and employee, even at the risk of violating federal law.

Whether these facts satisfy the demands of *Monell* is a question the Court expressly left open in *City of Springfield v. Kibbe*, 480 U.S. ___, 107 S.Ct. 1114, 94 L.Ed.2d 293 (1987). *See City of St. Louis v. Praprotnik*, 108 S.Ct. at 936 (Brennan, J., concurring).

We submit, however, that the policy of always "going with the principal", even at the known risk of violation of the employee's constitutional rights, is nothing more than an official policy of conscious indifference. Thus, the District Court indeed was correct in concluding that, as a matter of law, Jett satisfied the "policy or custom" requirement. *See, Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985).

CONCLUSION

For the reasons stated above, this petition for writ of certiorari should be granted.

Respectfully submitted,

FRANK GILSTRAP
FRANK HILL
SHANE GOETZ
(Counsel of Record)
HILL, HEARD, ONEAL,
GILSTRAP & GOETZ
1400 West Abram Street
Arlington, Texas 76013
817/261-2222

CERTIFICATE OF SERVICE

I, Shane Goetz, counsel of record for Petitioner Norman Jett, hereby certify that pursuant to Rules 28.3 and 28.5, three (3) copies of the above and foregoing Petition for Writ of Certiorari were served upon Mr. David W. Townend, counsel of record for Respondent Dallas Independent School District, by placing same in a United States postal service of mailbox, with first class postage prepaid, on June 14, 1988, addressed to Mr. Townend at his post office address, 1302 West Miller Road, P. O. Box 472286, Garland, Texas 75047.

_____
Shane Goetz

APPENDIX

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-1015

NORMAN JETT,
Plaintiff-Appellee,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT
and FREDERICK TODD,
Defendants-Appellants.

Filed August 27, 1986

Before: Thomas Gibbs Gee, Carolyn Dineen Randall, and Will Garwood, Circuit Judges.

Opinion by Judge Will Garwood

Appeals from the United States District Court
for the Western District of Texas
Barefoot Sanders, District Judge, Presiding

OPINION

WILL GARWOOD, Circuit Judge:

Appellee Norman Jett brought this suit against appellants, his former employer, the Dallas Independent School District (DISD), and Frederick Todd, his immediate supervisor, under 42 U.S.C. §§ 1981 and 1983, alleging due process, First

Amendment, and equal protection violations. The district court entered judgment against the DISD and against Todd in his individual capacity. We reverse the finding that Jett suffered due process violations, holding that Jett was not deprived of a protected property interest. We further hold that the evidence is insufficient to support a finding of constructive discharge. We affirm liability against Todd in his individual capacity based on the racial discrimination and First Amendment claims.However, we reverse and remand on the issue of the DISD's liability; because the jury did not make sufficient findings to support municipal liability. Furthermore, we reverse and remand as to damages.

Facts and Proceedings Below

Norman Jett, a white, was the athletic director/head football coach at South Oak Cliff High School in Dallas, Texas until his reassignment to another DISD school in 1983. He was employed by the DISD from 1957 until 1983, and had taught and coached at South Oak Cliff since 1962. Around 1970, the year Jett was promoted to athletic director/head football coach, the racial composition at South Oak Cliff changed from predominantly white to predominantly black.

Frederick Todd, a black, was assigned as principal at South Oak Cliff in 1975. Tensions developed between Jett and Todd concerning several issues, including Jett's attendance record at faculty meetings, equipment purchasing policies, and lesson plan preparation. Several of the problems centered around the November 19, 1982 football game between South Oak Cliff and Plano. Prior to the game, Jett was quoted by a newspaper as saying his team was bigger and better than SMU and the Dallas Cowboys. Todd objected to this statement, believing that it was not true and that is degraded a collegiate team and a professional team. After South Oak

Cliff lost the game, Jett entered the officials' locker room in violation of league rules and stated to two black officials that he would never use black officials in another game. Jett had requested black officials for the game despite the Plano coach's position against using black officials. Other controversies erupted over the game, including a reporter's accusations that Jett and other coaches were bribed, players' complaints that the game plan was not followed, and coaches' complaints that nonschool personnel were allowed in the booth. Todd felt that Jett did not show proper leadership in responding to these complaints. In another incident, Jett was quoted in the newspaper as stating that only two South Oak Cliff athletes could meet proposed NCAA academic eligibility requirements. Todd objected to this statement because he believed that far more graduates could meet the proposed requirements.

On March 15, 1983, Todd informed Jett that he intended to recommend that Jett be relieved as athletic director/head football coach. Todd sent a letter dated March 17, 1983 to John Kincaide, white, director of athletics for the DISD, recommending Jett's removal based on poor leadership performance, his inability to plan adequately, and the events surrounding the Plano game.

After meeting with Jett on March 15, Todd made an appointment for Jett to see Kincaide that day. Jett met with Kincaide at the DISD Administration Building. Kincaide suggested to Jett that he return to South Oak Cliff until he received something in writing. Jett then met with John Santillo, director of personnel for the DISD, who suggested to Jett that he should transfer schools because the damage had already been done. At this point, Jett became upset and Santillo suggested that he and Jett meet with Linus Wright, white, Superintendent of the DISD. During this meeting, Jett informed Wright and Santillo that he believed Todd's recommendation was unfounded and

that Todd wanted a black coach. Wright suggested that Jett should consider leaving South Oak Cliff, because he and Todd were having difficulties working together. Wright then assured him that the DISD would take care of him and find him another position.

On March 25, 1983, Wright, Santillo, Kincaide, Todd, and two other school officials met to determine whether Jett should remain at South Oak Cliff. Jett was not invited to attend. After the meeting, Wright officially affirmed Todd's recommendation to remove Jett as South Oak Cliff athletic director/head football coach based on irreconcilable conflicts between Jett and Todd. Wright explained at trial that in such circumstances he was compelled to go with the principal.

Soon after the meeting, Santillo notified Jett of his reassignment as a teacher at the Business Magnet School and told him it was the only position available. This assignment, which was effective approximately April 4, 1983, did not include any coaching responsibilities. Although Jett reported to the Business Magnet School, he soon began to miss class because of his emotional distress. After Santillo expressed concern about his poor attendance record, Jett again met with Santillo on May 4, and then with Wright that same day. Wright told Jett that, although no athletic director/head coaching positions were available at the time, Jett would not have to apply for a coaching job and would be considered for any that came open.

On May 5, 1983, Santillo wrote Jett a letter stating that he was being placed on the "unassigned personnel budget," and that he was being assigned to the security department, but that he could not expect to remain in the department for the next school year. The letter also informed Jett that he could pursue any available position and that, if he was not recommended for a staff or quasi-administrative position, he

wouldbe assigned a classroom teacher position. Upon receiving the letter, Jett filed this suit.

Around August 4, 1983, Jett received notice that he had been assigned to Jefferson High School as a history teacher/freshman football coach/freshman track coach. Although a head coaching job had previously become available at Madison High school, Jett was not assigned this position, nor did he apply for it. Kincaide decided against assigning Jett to the Madison position because of the pending lawsuit. On August 19, 1983, Jett sent his letter of resignation to the DISD.

Jett's suit was brought against the DISD, Todd in his individual and official capacities, and the DISD Board of Trustees in their official capacities under 42 U.S.C. §§ 1981 and 1983. The jury determined that Jett was deprived of his position as athletic director/head football coach prior to the end of the 1982-1983 school year based on his race and his exercise of protected speech and in violation of his right to procedural due process. In addition, the jury found that Jett was constructively terminated from DISD employment in August 1983. The jury awarded Jett a total of $850,000, including $50,000 punitive damages against Todd The district court set aside the award of punitive damages, finding "[t]here is absolutely no evidence that Defendant Todd's actions were taken in a malicious, wanton or oppressive manner." It also ordered a remittitur, which plaintiff accepted, with the resulting judgment being against the DISD for $450,000 actual damages, plus $112,870.45 for attorneys' fees, with Todd's being jointly and severally liable for all the attorneys' fees and $50,000 of the damages.

Defendants Todd and DISD timely filed this appeal.

DISCUSSION

Due Process

Defendants first challenge the finding that Jett suffered a due process violation, arguing that Jett did not have a property interest in the athletic director/head football coach position at South Oak Cliff. They also contend that Jett was not constructively terminated in August 1983, and thus was not deprived of any property interest he may have had in the remainder (or in renewal) of his contract.[1] We must decide whether Jett had a constitutionally protected property interest by reference to state law. *Cleveland Board of Education v. Loudermill*, 470 U.S. 352, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985); *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). The Supreme Court has described the "hallmark of property" as "an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 1155, 71 L.Ed.2d 265 (1982).

Under Texas law, a school district may adopt the continuing contract scheme provided by Tex. Educ. Code Ann. § 13.101 (Vernon 1972), or it may offer fixed term contracts under section 23.28 of the Education Code. *See Wells v. Hico Independent School District*, 736 F.2d 243, 252 (5th Cir. 1984). The DISD has

---

1 Defendants' property interest and constructive discharge contentions were adequately raised in their motions for instructed verdict and for judgment n.o.v., as well as in objections to the charge.

No liberty interest claim was submitted to the jury or found by the district court.

adopted a fixed term contract scheme. Jett was employed under a five-year "teacher contract" that extended until the end of the 1983-1984 school year. He taught classes and was a member of the faculty. The written contract provided that Jett was employed as a teacher "subject to assignment." The contract authorized the superintendent "to assign the teacher to such school as he may determine, and may from time to time assign or reassign the teacher to other schools." Jett was assigned as athletic director/head football coach at South Oak Cliff for the 1982-1983 school year.

Defendants challenge the district court's finding that there was sufficient evidence that Jett had a property interest in his athletic director/head football coach position at South Oak Cliff to authorize submission of the due process issue respecting this position to the jury. The district court instructed the jury that "[a] transfer to a position in which the employee receives less pay or has less responsibility than in the previous assignment or which requires a lesser degree of skill can constitute a deprivation of a property interest." The jury found that Jett possessed a property interest in his employment as head coach and athletic director at South Oak Cliff. In ruling on defendants' motion for judgment n.o.v., the district court found that Jett had a property interest based on Superintendent Wright's concession that there was an oral contract for Jett to serve as head coach and athletic director throughout the 1982-1983 school year (August 9, 1982 through June 2, 1983) and on Jett's supplementary pay of $4,773 for his coaching services during this time. Yet, it is undisputed that Jett received the full supplementary pay throughout the 1982-1983 school year (and would likewise have received it for the 1983-1984 year, under his teaching and coaching assignment at Jefferson High School, had he not resigned).

[1] Superintendent Wright testified at trial that Jett held an oral contract with the DISD to serve as a coach for the 1982-

1983 school year and that he could not be removed as coach except for good cause.[2]

We have held a public employee's demotion to be a deprivation of a property interest when the employee lost economic benefits that accompanied a position for which he had a legitimate claim of entitlement. *See, e.g., Shawgo v. Spradlin*, 701 F.2d 470, 476 (5th Cir.), *cert. denied*, 464 U.S. 965, 104 S.Ct. 404, 78 L.Ed.2d 345 (1983). Nevertheless, because Jett received

---

2 Jett's written "Notice of Assignment and Salary" explicitly provides that it is not an employment contract, but "an indication of assignment and salary." It assigns Jett to South Oak Cliff High School as a "Teacher-CTU 195." Wright testified that this designation indicates the appropriate number of hours (classroom teacher units) for a head football coach. However, the notice of assignment does not reflect the supplementary pay for coaching, listing Jett's salary as $27,425. Jett received the supplementary pay for $4,773 for his coaching services pursuant to his oral agreement with the DISD.

In *Grounds v. Tolar Independent School District*, 694 S.W.2d 241 (Tex. App. - Fort Worth, 1985), a Texas court of appeals co construing the term contract scheme, Tex. Educ. Code Ann. section 23.28, and the Term Contract Nonrenewal Act, id. sections 21.201-.211, held: "[T]he statutes indicate that coaches are hired as teachers and may be assigned to other teaching duties at the discretion of the school district unless the coach's contract specifically limits the duties to which he may be assigned." 694 S.W.2d at 245. However, the Texas Supreme Court reversed the decision on jurisdictional grounds. 707 S.W.2d 889 (Tex. 1986).

the economic benefits that accompanied his coaching assignment, we must assess whether the oral contract created a property interest throughout the school year in the duties and responsibilities entailed in his assignment.[3]

[2] Although "mutually explicit understandings" may create a property interest, *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 2699, 33 L.2d 570 (1972), we find that Jett's oral contract

---

3 When a public employee has a legitimate entitlement to his employment, the due process clause may protect as "property" no more than the status of being an amployee of the governmental employer in question to gether with the economic fruits that accompany the position. Although the governmental employer may specifically create a property interest in a non-economic benefit - such as a particular work assignment - a property interest in employment generally does not create due process property protection for such benefits. *See Findeisen v. North East Independent School District*, 749 F.2d 234, 240-41 & n.3 (5th Cir. 1984) (Garwood, J., concurring), *cert. denied.*, ____ U.S. ____ 105 S.Ct. 2657, 86 L.Ed.2d 274 (1985). Of course, a significant loss in responsibilities may result in a deprivation of a liberty interest when the plaintiff has been stigmatized. *See Kelleher v. Flawn*, 761 F.2d 1079, 1987 (5th Cir. 1985). Moreover, an employee's loss of noneconomic benefits may support an action for breach of contract. However, not every breach of an employment contract on the part of the government amounts to a deprivation of a property interest. *See Casey v. Depetrillo*, 697 F.2d 22 (1st Cir. 1983) (per curiam); *Vail v. Board of Education of Parish Union School District No. 95*, 706 F.2d 1435, 1449 (7th Cir. 1983) (Posner, J., dissenting), *aff'd by an equally divided Court*, 466 U.S. 377, 104 S.Ct. 2144, 80 L.Ed.2d 377 (1984).

here did not create a property interest in the intangible, non-economic benefits of his assignment as coach. Jett's written notice of assignment and his oral contract concerned his assignment as a whole and did not address his specific duties as coach. In *Winkler v. County of DeKalb*, 648 F.2d 411 (5th Cir. 1981), we addressed the due process claim of a public employee who was transferred to a new position at the same salary level, but with greatly reduced responsibilities. We found this transfer to be a deprivation of a property interest, because the DeKalb County Code and the conduct of the parties created a claim of entitlement to certain responsibilities of the employee's prior position. We observed that the County Code "indicates to employees that transfers will be to a position whose duties are of the kind or quality encompassed by their classification. It establishes the reasonable expectation that an employee will not be demoted to a position of vastly diminished responsibilities without cause." *Id.* at 414. However, in *Kelleher v. Flawn*, 761 F.2d 1079 (5th Cir. 1985), we rejected a public employee's claim of entitlement to the specific duties that she had prior to the reassignment, commenting that her new duties were "well within the bounds" of duties generally assigned to those in her position. *Id.* at 1087. The employee had asserted an entitlement to teach certain courses, but we found no guarantee, contract, or statute creating an entitlement to teach courses. *Id.* In the present case, we find that neither Jett's written contract nor his oral contract with the DISD gave Jett a property interest in his coaching duties. Therefore, although he may have had a property interest in his coaching salary for the 1982-1983 school year, he did not have such an interest in the continuation of his coaching responsibilities throughout that year.

Constructive Discharge

As noted, defendants also contend that there is insufficient evidence to support the jury's finding that Jett was constructively terminated from his employment in August 1983.[4] In reviewing the district court's denial of defendants' motion for judgment n.o.v., we must consider all of the evidence in the light and with all reasonable inferences most favorable to Jett. *Boeing Company v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). Because the facts and inferences point so strongly in favor of defendants on this issue, we find as a matter of law that Jett was not constructively terminated. *Id.*[5]

[3, 4] A constructive discharge occurs when the employer makes conditions so intolerable that a reasonable person in the employee's position would have felt compelled to resign. *Kelleher*, 761 F.2d at 1086; *Junior v. Texaco, Inc.*, 688 F.2d 377, 379 (5th Cir. 1982). The determinative factor is not the

---

4 Jett clearly had a protected property interest in the remaining year of his five-year teaching contract. As we find insufficient evidence of constructive discharge, we pretermit the question of whether constructive discharge can give rise to a due process violation, at least where, as here, there is no finding of intent on the part of the employer to thereby cause the employee's termination or to avoid the procedures that would be required for actual discharge. Constructive discharge is also relevant to the damages claimed for the equal protection and First Amendment violations found respecting the March 1983 decision to relieve Jett of his duties as head coach and athletic director at South Oak Cliff.

5 We often have noted in the context of bench trials the uncertainty over whether the issue of constructive discharge is a fact-finding subject to the clearly (Continued on pg. 12A)

employer's intentions, but the effect of the conditions on a reasonable employee. *Kelleher*, 761 F.2d at 1086. Jett tendered his resignation on August 19, 1983, stating that, after considering his assignment to Thomas Jefferson High School, he could not accept the position and felt "forced to resign from the public education field with much sorrow and humiliation." Jett argues that his significant loss in coaching responsibilities as well as the racial discrimination and the retaliation for his protected speech that prompted his reassignment amounted to a constructive discharge.

[5] Although a demotion or transfer in some instances may constitute a constructive discharge, we find that Jett's loss of coaching responsibilities was not so intolerable that a reasonable person would have felt compelled to resign. We have noted that constructive discharge cannot be based upon the employee's subjective preference for one position over another. *Kelleher*, 761 F.2d at 1086. Although Jett's desire to continue coaching may not be equivalent to Kelleher's preference to teach certain courses, *id.* at 1086-87, we believe that Jett's new working conditions simply were not so difficult or so unpleasant that he had no choice but to resign. *See Vaughn v. Pool Offshore Company*, 683 F.2d 922, 926 (5th Cir.

---

5 (Cont. from pg. 11A) erroneous rule of a mixed uncertainty over whether the issue of constructive discharge is a fact-finding subject to the clearly erroneous rule or a mixed question of law and fact. Kelleher, 761 F.2d at 1086; Shawgo, F.2d 377, 379-80 (5th Cir. 1982). The district court here determined constructive discharge to be a question of fact and submitted it to the jury.

1982). Moreover, the humiliation and embarrassment that Jett suffered are not significant enough to support a constructive termination. *See Shawgo*, 701 F.2d at 481-82 (publicity and derogatory comments resulting from disciplinary proceedings were not constructive discharge); *Junior*, 688 F.2d at 380 (unfavorable work evaluations were not constructive discharge).

[6] Furthermore, we believe that the claimed constitutional violations underlying Jett's reassignment cannot alone support a finding of constructive termination. For example, we have held that unlawful discrimination in the form of unequal pay may be relevant to a determination of constructive discharge, but alone cannot constitute such an aggravated situation that a reasonable employee would feel forced to resign. *Pittman v. Hattiesburg Municipal Separate School District*, 644 F.2d 1071, 1077 (5th Cir. 1981) (racial discrimination); *Bourque v. Powell Electrical Manufacturing Company*, 617 F.2d 61, 66 (5th Cir. 1980) (sex discrimination). Jett has not shown any racial discrimination or free speech violations (or likelihood or threats thereof) subsequent to March 1983 that would constitute intolerable working conditions. Significantly, Jett resigned in August 1983 after receiving his assignment for the 1983-1984 school year, but did not resign in March 1983 after the reassignment that he claims violated his equal protection and free speech rights. We conclude that Jett was not constructively terminated from his employment with the DISD.

Racial Discrimination/First Amendment

The district court held that there was sufficient evidence to support the jury's finding that Todd's recommendation of Jett's removal as head coach and athletic director was based on Jett's race, and that Jett's exercise of his First Amendment rights was also a substantial motivating factor in Todd's recommendation. The district court thus found Todd liable in

his individual capacity. Moreover, it also imposed liability on the DISD based on jury findings of Superintendent Wright's action in approving Todd's recommendation without independent investigation, and on the undisputed fact that Wright had exclusive authority to act for the DISD in such matters.

1. Todd's Liability

(a) Racial discrimination claims

Defendants argue that Jett did not establish that Todd's recommendation to transfer him was racially motivated. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the Supreme Court established the usual order of proof and allocation of burdens to be used in cases alleging discriminatory treatment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. This scheme for proving disparate treatment cases applies also to cases brought under sections 1981 and 1983 when these statutes are used as parallel causes of action with Title VII. *Hamilton v. Rodgers*, 792 F.2d 439, 442 (5th Cir. 1986); *Chaline v. KCOH, Inc.*, 693 F.2d 477, 479 (5th Cir. 1982); *Whiting v. Jackson State University*, 616 F.2d 116, 121 (5th Cir. 1980).

Defendants first contend that Jett failed to establish a *prima facie* case of racial discrimination, suggesting that a white plaintiff may not establish a *prima facie* case by meeting the elements of *Burdine* and *McDonnell Douglas*. However, this scheme of proof applies to white persons in the same manner that it applies to blacks. *McDonald v. Sante Fee Trail Transportation Company*, 427 U.S. 273, 96 S.Ct. 2574, 2582, 49 L.Ed.2d 493 (1976); *Chaline*, 693 F.2d at 479-82. The burden of proving a *prima facie* case is "not onerous." *Burdine*, 101 S.Ct. at 1094.

Jett more than met the normal minimum requirements for a *prima facie* case of racial discrimination by presenting evidence from which the jury could find that he, a white, was a member of a racial minority at South Oak Cliff, that he was well, indeed exceptionally well, qualified for the athletic director/head football coach position, and that on the recommendation of his black superior he was replaced by a black who was not more, and was indeed substantially less, qualified. *See Chaline*, 693 F.2d at 480-81.

Once Jett established a *prima facie* case of racial discrimination, the burden shifted to the DISD to articulate legitimate, nondiscriminatory reasons for its actions. The employer's burden is one of production, not persuasion. *Burdine*, 101 S.Ct. at 1095; *see also, McDaniel v. Temple Independent School District*, 770 F.2d 1340, 1346 (5th Cir. 1985). Defendants met this production burden with, among other things, Todd's March 17, 1983 letter to John Kincaide, recommending Jett's removal based on his poor leadership performance, his failure to prepare lesson plans, and his handling of the Plano game.

Once the employer satisfies this burden of production, the rebuttable presumption of discrimination created by the *prima facie* case disappears. *Burdine*, 101 S.Ct. at 1094-95; *McDaniel*, 770 F.2d at 1346. At this point, the proper inquiry is whether the defendant intentionally discriminated against the plaintiff. The fact finder is to consider all of the plaintiff's evidence, whether introduced to establish the *prima facie* case or to show that the defendant's proffered reasons are unworthy of belief. Burdine, 101 S.Ct. at 1095; *Jones v. Western Geophysical Company*, 761 F.2d 1158, 1161 (5th Cir. 1985). The plaintiff may meet this ultimate burden of proof either by showing that the employer's proffered reasons are pretextural or by establishing that the employer's action more likely than not was motivated by a discriminatory reason. *McDaniel*, 770 F.2d at 1346.

[7, 8] We do not suggest that presentation of a *prima facie* case necessarily means that the plaintiff can withstand a motion for directed verdict when faced with a defendant's evidence showing nondiscriminatory reasons for the complained of action. *Cf. Sherrod v. Sears, Roebuck & Company*, 785 F.2d 1312 (5th Cir. 1986). Rather, the issue is whether, on the record as a whole, there is sufficient evidence from which the fact finder may reasonably conclude that race was a substantial motivating factor in the challenged action. While resolution of that issue indeed presents a very close question here, we are ultimately persuaded that there is sufficient evidence to sustain the verdict against Todd in this respect. We have already noted the evidence establishing Jett's *prima facie* case, which exceeded the normally applicable minimum requirements in that respect. Todd's testimony was the primary evidence tending to support the existence of legitimate nondiscriminatory reasons for the complained of action. In contrast, Wright described Jett as a highly valuable employee, an "outstanding" person who "had made a great contribution to the School District," and DISD Director of Athletics Kincaide testified that he knew of no good reason Jett should have been relieved of his responsibilities as South Oak Cliff athletic director. There was persuasive evidence that Jett was a highly capable and successful coach. Moreover, Todd, prior to 1983, had never given Jett an unsatisfactory rating, and had indeed generally rated him highly. The jury could conclude that Todd's attempted explanation of these ratings was not satisfactory. Todd's complaint of Jett's not following the "game plan" in the Plano game could be viewed as questionable, given Todd's admission that he knew essentially nothing about football or coaching. Similarly questionable was the complaint regarding insufficient recruitment efforts at South Oak Cliff "feeder" schools given the severe DISD restrictions on such activities. Further, Todd testified that he placed Jett

on "probation" in early 1983, and that the word "probation" was on an evaluation report signed by Jett at that time. However, Jett testified that "probation" did not appear on the form when he signed it, and the placement of the word on the page was consistent with its having been added at a later time. By the end of the 1982-1983 school year, all twelve of the South Oak Cliff football coaches were black, and all had been recommended by Todd. Likewise, of the four candidates recommended by Todd for final consideration as Jett's replacement, three were black. There was evidence that many of the tensions between Jett and Todd involved issues of race. The events surrounding the Plano game, including Jett's statements to the black officials, formed a significant part of the basis of Todd's recommendation. In addition, Todd had been critical of Jett for not recruiting black middle school athletes to South Oak Cliff. Furthermore, there was evidence beyond that of Jett's replacement that Todd favored black coaches. We therefore conclude that the jury's finding of racial discrimination was supported by at least minimally sufficient evidence.

(b) First Amendment claims

[9] The jury also determined that Jett's exercise of protected speech was a substantial and motivating factor in Todd's recommendation. Jett may recover for resulting injuries if he was reassigned in retaliation for protected speech even though he does not have a protected property interest in his former position. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 574, 50 L.Ed.2d 471 (1977). Whether certain speech addresses a matter of public concern is a question of law "determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983)

(footnote omitted). An employee's speech generally is not protected when it "cannot be fairly considered as relating to any matter of political, social, or other concern in the community." *Id.; see Gonzalez v. Benavides*, 774 F.2d 1295, 1300-01 (5th Cir. 1985), *cert. denied*, _ U.S. _, 106 S.Ct. 1789, 90 L.Ed.2d 335 (1986). Jett was quoted in the newspaper as stating that few South Oak Cliff athletics could meet certain proposed NCAA academic eligibility requirements. This remark, which concerns the academic development of public high school football players and their potential eligibility for playing college football, certainly addresses matters of concern to the community. *See Connick*, 103 S.Ct. at 1690; *Thomas v. Harris County*, 784 F.2d 648, 653 (5th Cir. 1986); *Davis v. West Community Hospital*, 755 F.2d 455, 461-62 (5th Cir. 1985).[6]

[10, 11] Defendants claim that because the statements were not true they cannot be protected. However, the First Amendment generally protects false statements unless they were made knowingly or with a reckless disregard for the truth. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 1738, 20 L.Ed.2d 811 (1968); *Gates v. City of Dallas*, 729 F.2d 343, 346 (5th Cir. 1984). There was no evidence that Jett knowingly made false statements or spoke with a reckless disregard for the truth in discussing the eligibility of his athletes

---

6 *Connick* also requires a balancing between the employee's freedom of expression and the school's interest in "the effective and efficient fulfillment of its responsibilities to the public." 103 S.Ct. at 1692; *see Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). However, defendants do not argue here that the DISD's concerns of efficient administration outweighed Jett's interest in expression.

under proposed NCAA standards. Moreover, the statements were not made as a part of Jett's performance of his official duties or as a part of DISD business.

Todd conceded in his trial testimony that Jett's published remarks were a "substantial motivating factor" in his decision to recommend Jett's removal. *See Mt. Healthy City*, 97 S.Ct. at 576. Thus, the burden of proof was shifted to defendants to show that Todd's reassignment recommendation would have been made in the absence of the protected speech. *Id.; Kelleher*, 761 F.2d at 1083. The evidence at least minimally supports the jury's finding that the recommendation would not have occurred in the absence of this public statement.

[12] Finally, defendants contend that Todd cannot be held individually liable on the racial discrimination or First Amendment claims because he did not have the authority to reassign Jett and because he acted in good faith. First, Jett must establish an affirmative causal link between Todd's action and any injury Jett sustained from the civil rights violations. *Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir.), *cert. denied*, 464 U.S. 897, 104 S.Ct. 248, 78 L.Ed.2d 236 (1983). Even though Todd lacked the final authority to reassign Jett, the jury found, on adequate evidence, that Wright's reassignment decision was based on Todd's recommendation and that Jett suffered damages proximately caused by Todd's challenged action. The form of the charge in this respect is not complained of as to Todd. We reject Todd's contention that the judgment as to him must be reversed because, as is concededly the case, he had only recommending authority.Second, Todd is not protected by the qualified good faith immunity,

because he violated Jett's constitutional rights and those rights were clearly established at the time of the recommendation. *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 3021, 82 L.Ed.2d 139 (1984).[7]

2. DISD's Liability

(a) Section 1983

[13] We now turn to the DISD's claim that there was insufficient evidence to support a finding of municipal liability under 42 U.S.C. § 1983. The DISD cannot be held liable under section 1983 based on *respondeat superior*, however, liability may be imposed if the constitutional violation is due to official action, policy, or custom. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). In *Bennett v. City of Slidell*, 735 F.2d 861 (5th Cir. 1984) (en banc) (per curiam) (modified 728 F.2d 762 (en banc)), *cert. denied*, ___ U.S. ___, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985), we defined "official policy" as:

"1. A policy statement, ordinance, regulation, or *decision that is officially adopted* and promulgated by the municipality's lawmaking officers or *by an official to whom the lawmakers have delegated policy-making authority*; or

"2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom

7 We also note that the jury rejected Todd's good faith defense.

must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority." *Id.* at 862 (emphasis added).

The district court's instruction to the jury concerning municipal liability, to which the DISD objected, was deficient in light of *Bennett*, because it did not state that the city could be bound by the principal or superintendent only if he was delegated policymaking authority (or if he participated in a well settled custom that fairly represented official policy and actual or constructive knowledge of the custom was attributable to the governing body or an official delegated policymaking authority).[8] See Webster v. City of Houston, 735 F.2d 838, 840-42 (5th Cir.) (en banc) (per curiam), *rev'd on other grounds*, 739 F.2d 993 (5th Cir. 1984) (en banc). Yet, the district court found the *Bennett* test satisfied as a matter of law. The court based this conclusion on its determination that the DISD Board had delegated "sole and unreviewable authority to the superintendent to 'reassign' members of the coaching staff," and that Jett was reassigned in the customary manner.

The evidence is indeed undisputed that although the DISD Board alone had and retained authority to terminate teachers, including coaches, nevertheless Superintendent Wright had

8 The district court instructed the jury: "A public independent school district (such as and including the Dallas Independent School District) is liable for the actions of its Board of Trustees and/or its delegated administrative officials (including the Superintendent and school principals), with regard to wrongful or unconstitutional action taken against or concerning school district personnel."

cluding members of the coaching staff. In *Neubauer v. City of McAllen, Texas*, 766 F.2d 1567 (5th Cir. 1985), we found that a termination decision made by the city manager, who possessed exclusive authority in such decisions, constituted policymaking power sufficient to hold the city liable under section 1983. *Id.* at 1573-74. We observed that the city manager acted "in lieu of the governing body" in deciding whether to fire employees. *Id.* at 1574 (quoting *Bennett*, 728 F.2d at 769). The Supreme Court recently has reaffirmed that "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances."*Pembaur v. City of Cincinnati*, __ U.S. ___, 106 S.Ct. 1292, 1298, 89 L.Ed.2d 452 (1986). Of course, not every decision by a municipal policymaker subjects the municipality to section 1983 liability: "Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Id.* 106 S.Ct. at 1299 (footnote omitted). Moreover, that a policymaking official has discretion in the exercise of a particular function does not give rise to municipal liability for the official's exercise of such discretion unless the official also is responsible for final municipal policy respecting the function. *Id.* at 1299-1300. In this connection, *Pembaur* also seems to indicate that the mere fact that an official has discretionary, and inferentially final, authority to make particular concrete decisions in a given area does not necessarily mean that the official is a policymaker with respect to that area or those decisions. *See* 106 S.Ct. at

1300 n. 12[9] If the latter statement is a correct reading of *Pembaur*, then Wright's final exclusive authority to make discrete individual transfer decisions would not alone subject the DISD to responsibility for his actions in the case of a particular individual transfer decision *unless* he *also* had final authority with respect to general DISD transfer *policy* applicable to teachers or coaches. We need not, however, decide whether this reading of *Pembaur* is correct or whether Wright was shown to be the DISD official responsible for establishing DISD employee transfer policy. Even if the record established as a matter of law that Wright had the requisite policymaking authority, the district court's instructions were nevertheless insufficient.

---

9 Footnote 12 of *Pembaur* states:

"Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis of county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff delegated its power to establish final employment policy to the Sheriff, the Sheriff's delegate its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability." (Emphasis in original)

See also *Rhode v. Denson*, 775 F.2d 107, 109-10 (5th Cir. 1985), cert. denied, ____ U.S. _____, 106 S.Ct. 2891, 90 L.Ed.2d 978 (1986).

The district court instructed the jury that, if it found that Todd's recommendation was based upon consideration of plaintiff's race and would not have been made in the absence of this consideration, the DISD "may be liable for violating plaintiff's constitutional rights if the decision to remove plaintiff was made solely on the basis of defendant Todd's recommendation without any independent investigation." The court also gave the same instruction concerning the DISD's liability conditioned on a finding that Jett's exercise of First Amendment rights was a substantial motivating factor in Todd's recommendation and that his recommendation would not have been made in the absence of the exercise of these rights.[10]

[14] The jury's finding that Wright made the decision based solely on Todd's recommendation without further investigaf

---

10 The DISD objected to the charge concerning its liability on the basis that it was contrary to *Monell*, did not require a finding of custom or policy, and imposed liability on a *respondeat superior* basis. It also objected on the basis that the instruction would impose liability on the DISD without any finding of fault, or even negligence, on its part and amounted to imposing a "form of strict liability" on the DISD.

tion is not sufficient to support the imposition of municipal liability. The jury made no finding that Wright's decision was in fact improperly motivated or that Wright knew or believed that (or was consciously indifferent to whether) Todd's recommendation was so motivated. *See Neubauer*, 766 F.2d at 1578-80.

We have stated that the First Amendment does not protect a government employee "from the possibility that his employment might be terminated--however mistaken or *unreasonable* that decision might be--so long as his employer is not *motivated* by the desire or intention to curtail or retaliate for employee activity which the Constitution protects." *Neubauer*, 766 F.2d at 1578 (emphasis in original); *see Connick*, 103 S.Ct. at 1690. If the DISD is to be liable because of Wright's actions, then those actions must *themselves* have been wrongful, otherwise the DISD is necessarily being held liable for Todd's actions, and Todd clearly was not a policymaker under *Pembaur*.

For Wright's actions to have been wrongful, they must either have been based on Jett's race or Jett's exercise of his First Amendment rights. That Wright may have acted solely on the basis of Todd's recommendation does not establish either fact, at least where, as here, it was neither found nor established as a matter of law that Wright knew or believed that (or, perhaps, was consciously indifferent to whether) Todd's recommendation was so based. Of the *many* facially legitimate matters mentioned in Todd's recommendation letter to Kincaide, only one arguably pertains to either race or freedom of expression, namely, that after the Plano game Jett went into the officials' room, which was contrary to school district policy, and said, "I will never use a Black official again." Wright testified that this played no part in his decision. He also testified that Jett's having made public statements in the media played no part in his decision, and

that he was unaware that Todd based his recommendation on remarks made by Jett to the media. Wright further stated that Jett's race played no part or role in his decision. Todd testified that race played no part in his recommendation, and that the referenced Plano game incident was considered by him not on a racial basis, but because Jett violated school district policy by going into the officials' room and because the race of the officials should not be considered in evaluating their performance. Taken at face value, this does not demonstrate that Todd's actions violated Jett's equal protection or First Amendment rights. While Wright stated that Jett had told him he thought that Todd's recommendation was made because Todd wanted a black coach,[11] there is no indication whatever that Wright credited this, nor does the evidence conclusively establish that he should have. Wright testified that he discussed several of Todd's factually legitimate complaints with Jett, and informed him that in a case of a conflict between a coach and his principal, Wright would have to side with the principal, "unless he is in error himself and I hadn't found where Dr. Todd was in error." Wright had ordered an investigation, but was unaware that it was not actually carried out. It was not established as a matter of law that Wright acted other than in complete good faith or with knowledge or belief that (or conscious indifference to whether) Todd's recommendation was based in any way on Jett's race or exercise of his First Amended rights.

---

11 Jett himself testified that it was not until sometime after his removal as head coach and athletic director had been accomplished that he concluded that race had played a part in Todd's recommendation, and until then he believed it had not.

We thus conclude that the jury findings are insufficient to support the imposition of liability against the DISD under section 1983.

(b) Section 1981

Defendants also challenge the district court's conclusion that liability may be imposed against the DISD solely on the basis of *respondeat superior* under 42 U.S.C. § 1981. The district court relied upon our decision in *Garner v. Giarrusso*, 571 F.2d 1330 (5th Cir. 1978), in which we found that section 1981 did not provide immunity like that available to the municipality under the *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), interpretation of section 1983.[12] 571 F.2d at 1338-41. *See also Mahone v. Waddle*, 564 F.2d 1018, 1031 (3d Cir. 1977), *cert. denied*, 438 U.S. 904, 98 S.Ct. 3122, 57 L.Ed.2d 1147 (1978). Of course, *Garner* was decided before the Supreme Court determined in *Monnell* that a municipality may be liable under section 1983, although not on the basis of *respondeat superior*. We therefore must decide whether *respondeat superior* may support municipal liability under section 1981 in light of *Monell* and it progeny.

In *Monell*, the Supreme Court carefully examined the legislative history of section 1981 and concluded that Congress did intend municipalities to be included among those persons to whom the statute applies, 98 S.Ct. at 2035, but that Congress did *not* intend for a municipality to be held liable unless action pursuant to official municipal policy caused a constitu-

---

12 *Garner* did not address whether the municipal liability could be imposed on the basis of *respondeat superior*.

tional tort. *Id.* at 2036. The Court discussed Congress' rejection of the Sherman Amendment, which was viewed by its proponents "as a form of vicarious liability for the unlawful acts of the citizens of the locality." *Id.* at 2036 n. 57. The Court concluded that "when Congress' rejection of the only form of vicarious liability presented to it is combined with the absence of any language in § 1983 which can be easily construed to create *respondeat superior* liability, the inference that Congress did not intend to impose such liability is quite strong." *Id.* The Court also considered the language of the statute, which appears to require that a municipality found liable have caused the constitutional violation or have caused its employee to violate another's constitutional rights. *Id.* at 2036. Thus, the Court concluded in *Monell*, and has recently reaffirmed, that a municipality may be held liable only for its own constitutional violations. *Pembaur*, 106 S.Ct. at 1297-98; *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 2433-34, 85 L.Ed.2d 791 (1985).

[15-18] We believe that to impose municipal liability on a *respondeat superior* theory under section 1981 would be inconsistent with the Supreme Court's reasoning in *Monell* and *Pembaur*. Unlike section 1983, which only provides a remedy for violations of rights secured by federal statutory and constitutional law, *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 2504, 65 L.Ed.2d 555 (1980); *Irby v. Sullivan*, 737 F.2d 1418, 1427 (5th Cir. 1984), section 1981 provides a cause of action for public or private discrimination based on race or alienage. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975); *see generally* B. Schlei & P. Grossman, *Employment Discrimination Law* 668-77 (2d ed. 1983). Thus, section 1981 is broader than section 1983 in that it reaches private conduct, but narrower in that it only provides a remedy for discrimination based on race or alienage. B. Schlei & P. Grossman, *supra* at 675-76. Therefore,

to permit municipal liability based on *respondeat superior* under section 1981 would impose liability on a city for only a few types of constitutional violations which might be committed by its employees. We believe that the Supreme Court's focus in *Monell* in this connection was not on particular types of "federal" wrongs, but rather was on a particular type of liability for all such wrongs. The Supreme Court's interpretation of section 1983 and its legislative history indicates that Congress did not intend to impose different types of liability on a municipality based on the particular "federal" wrong asserted. The *Monell* Court concluded that in 1871 when Congress enacted what is now codified as section 1983, which was five years after it had enacted the statute that became section 1981, Congress did not intend municipalities to be held liable for constitutional torts committed by its employees in the absence of official municipal policy. To impose such vicarious liability for only certain wrongs based on section 1981 apparently would contravene the congressional intent behind section 1983.[13]

---

13 We note that approximately a century later Congress did impose vicarious liability on an employer for its employee's unlawful discrimination when it enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Thus, a municipality may be found liable based on *respondeat superior* under Title VII. *See, e.g., Hamilton*, 791 F.2d at 444. Analogously, neither section 1983, *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 1146-47, 59 L.Ed.2d 358 (1979), nor section 1981, *Sessions v. Rusk State Hospital*, 648 F.2d 1066, 1069 (5th Cir. 1981), overrides the Eleventh Amendment, but Title VII does. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976).

Plaintiff relies on several cases applying a *respondeat superior* theory under section 1981 in the context of private employment. *See e.g. EEOC v. Caddis*, 773 F.2d 1373 (10th Cir. 1984); *Miller v. Bank of America* 600 F.2d 211 (9th Cir. 1979). Our reasoning, of course, does not prevent the imposition of vicarious liability on a private employer under section 1981. Other courts have held that a city may be liable for racially motivated actions of its employees on a *respondeat superior* theory under section 1981. *See Haugabrook v. City of Chicago*, 545 F.Supp. 276, 279-81 (N.D. Ill. 1982) (citing cases). In *Haugabrook*, on which plaintiff relies, the court looked to the differences between sections 1983 and 1981, and concluded that the *Monell* reasoning does not bear on section 1981. *Id.* The court stated that "there is no principled reason to distinguish between private and public employers based upon the wording or history and purpose of section 1981...." *Id.* at 281. We believe that the Supreme Court's interpretation in *Monell* of Congress' intent in enacting section 1983 provides compelling reasons for distinguishing between private and municipal liability under section 1981. Moreover, in past decisions we have, albeit without discussion, denied municipal liability asserted on a theory of *respondeat superior* under section 1981. *See Hamilton*, 791 F.2d at 444-45 (city held liable "only under

Title VII" although sections 1981 and 1983 raised); *Irby*, 737 F.2d at 1423-25 (same).[14]

Damages

We have reversed all liability findings as to the DISD, but have sustained liability as to Todd for the claimed equal protection and First Amendment violations.However, we have held that there was no evidence to warrant the submittal of the claimed due process violation nor of the claim of constructive discharge. A significant part of the damages were sought on the basis of the theory that Jett had been deprived of employment with the DISD.[15] Accordingly, a retrial is also required as to damages, both for Todd and the DISD. *Cf. Memphis Community, School District v. Stachura*, ___ U.S. ___, 106 S.Ct. 2537, 2544, 91 L.Ed.2d 249 (1986).

---

14 We also note that in other respects relief is available under Title VII for constitutional violations where it is not under sections 1981 and 1983. *See University of Tennessee v. Elliott*, ___ U.S. ___, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986) (applying collateral estoppel to state administrative fact-findings for purposes of sections 1981 and 1983 but not for purposes of Title VII).

15 In acting on the request for remittitur, the district court assumed that the evidence supported $294,000 of economic damages, a figure which was clearly based on the hypothesis that Jett had been constructively discharged. While the jury's verdict as to the DISD was segregated into pre- and post-August 20, 1983 damages, it was not so segregated as to Todd. Further, the remittitur was not expressly segregated between pre- and post-August 20, 1983 damages (Cont. 32A)

Conclusion

We determine that Jett has no claim against either Todd or the DISD for due process violation or constructive discharge, and we reverse the district court's contrary determinations. These claims are ordered dismissed. We sustain the findings of liability against Todd for equal protection and First Amendment violations, but reverse and remand the damages awarded against Todd on these counts for a new trial. We reference the findings of liability and damages against the DISD on the equal protection and First Amendment Claims and remand these claims and damages for another trial. The award of attorneys' fees is set aside and remanded for reassessment following retrial, both as to the DISD and Todd.[16]

Accordingly, the cause is remanded for further proceedings consistent herewith.

REVERSED and REMANDED.

---

15 (Cont. from pg. 31A) In light of the very sizable verdict, the district court's remittur and our other action on this appeal, we conclude that the intensity of justice require that the entire verdict on damages be set aside also.

16 Defendants have made various complaints as to the district court's computation of attorney's fees. We do not pass on the merits of defendants' challenges, for the district court must compute the attorneys' fees as to Todd following any retrial as to damages with respect to him and on the basis that Jett has no due process or constructive discharge claim. As to the DISD, should Jett prevail on retrial, attorneys' fees will also have to be recomputed. Jett has not challenged the district court's grant of judgment n.o.v. on his claim against Todd for exemplary damages, and that ruling remains in effect.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-1015

NORMAN JETT,

Plaintiff-Appellee,

versus

DALLAS INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Texas

ON SUGGESTION FOR REHEARING EN BANC
(Opinion August 27, 1986, 798 F.2d 748)

(February 5, 1988)

Before GEE, KING,* and GARWOOD, Circuit Judges.

* Formerly Carolyn Dineen Randall.

GARWOOD, Circuit Judge:

Seeking rehearing, appellee Jett complains of our decision herein that *respondeat superior* is not a legally valid basis for imposition of liability on the school district under 42 U.S.C. § 1981, and asserts that this holding conflicts with our opinion in *Garner v. Giarrusso*, 571 F.2d 1330 (5th Cir. 1978). Rejecting these contentions, we nevertheless deem appropriate some further explanation of our holding in this respect.

Garner was decided during the reign of *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), which held that a municipality was not a "person" within the meaning of 42 U.S.C. § 1983 (section one of the Civil Rights Act of 1871) and hence could under no circumstances incur any potential section 1983 liability, and before the decision in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), which reversed *Monroe* and held that a municipality was a "person" for purposes of section 1983 and hence could be liable thereunder, though not solely on a *respondeat superior* basis. That being the context, the question posed in *Garner* was not *respondeat superior*, but was rather whether municipalities were wholly exempted

from section 1981 (section one of the Civil Rights Act of 1866) as they were from section 1983. For purposes of this question-whether municipalities were subject to the statute-*Garner* distinguished between sections 1981 and 1983 on the basis that the latter, but not the former, was expressly restricted to persons, and persons did not include municipalities. *Garner*, 571 F.2d at 1339-40. This ground for treating municipalities differently under section 1983 than under section 1981 of course evaporated with *Monell's* holding that municipalities *were* persons under section 1983.[1]

Garner did not address whether municipal liability under section 1981 could be imposed on the basis of *respondeat superior*, and the opinion does not indicate that any contention in that respect was ever made. In *Garner*, a black police officer, following a bench trial, received a single lump-sum award of $5,000 damages under section 1918 for mental anguish and humiliation suffered as a result of undergoing a racially discriminatory transfer and reevaluation procedure while serving in the New Orleans police department. In affirming this award, we rejected the city's contention that *Monroe*, and the cases which followed it, wholly exempted municipalities from

---

1 *Garner* also expressed concern that it would be "anomalous" to hold private parties liable under section 1981, while exempting municipalities. *Id.* at 1341. But, again, this was in the context of rejecting a *Monroe* approach, completely taking municipalities out of the coverage of the statute. A *Monell* approach, by contrast, adequately accommodates this concern, as is reflected by *Garner's* recognition, discussed in the text, *infra*, that it was not holding municipalities to "vicarious liability." *Id.*

section 1981 coverage. *Garner* at 1339. In so holding, however, we explained that:

> "Our holding does not pose the problem of imposing *vicarious* liability upon a municipality because of the acts of its servants. *See Hamilton v. Chaffin*, 506 F.2d 904 (5th Cir. 1975). Garner's employment contract was with the city, and the city itself was responsible for assuring an absence of employment discrimination. To the extent that it failed to live up to this responsibility, it is liable in damages." *Garner* at 1341 (emphasis added).

Our explanation was consistent with the facts which were before us. Earlier in our opinion, we had affirmed the district court's findings that the transfer and reevaluation were discriminatory. Involved in the transfer were both Garner's superior officer and the city police superintendent, and the latter decided that Garner would have to undergo the reevaluation and "took full responsibility for" that decision. The district court found that the superintendent's reevaluation "decision was discriminatory." *Id.* at 1334. The inclusion of the superintendent in the scheme implicated the city directly, and resulted in liability on a basis other than *respondeat superior*. The instant case, however, is in a different posture. Here, we have a specific finding that Jett's principal, Todd, was racially motivated in his recommendation of Jett's reassignment. But as to Superintendent Wright, who ordered Jett's reassignment and had the sole and unreviewable authority to reassign, there is no finding of racial motivation (or that Wright knew or believed that, or was consciously indifferent to whether, Todd's recommendation was racially motivated). In the case at bar, wholly unlike *Garner*, the *respondeat superior* question is raised by the parties and presented by the procedural and factual context of the case. *Garner* realized that *respondeat superior* liability might "pose" a "problem" for municipalities, but did not have to resolve that issue or examine its ramifications.

We also observe that the only other municipal liability argument advanced by the city in *Garner*, apart from reliance on *Monroe*, was a plea for absolute or qualified immunity for municipalities, which we rejected. *Garner* at 1340-41. However, in light of the Supreme Court's reasoning in *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), rejection of municipal qualified immunity for purposes of section 1981 cannot easily co-exist with municipal *respondeat superior* liability thereunder. In *Owen*, the Court appears to have been significantly influenced by the policy consideration that the denial or qualified immunity to municipalities under section 1983 would not be unduly harsh on them because "when it is the local government itself that is responsible for the constitutional deprivation-it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government, rather than to let the entire burden fall on the injured individual," *id.* at 1418 n. 39, and because "the public will be forced to bear only the costs of injury inflicted by the 'execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.'" *Id.* at 1419 (quoting *Monell*).

Jett argues that the reasons which led *Monell* to reject *respondeat superior* liability for municipalities under section 1983 are absent under section 1981. We are not persuaded. In the first place, some of the same reasons are clearly applicable. Although *Monell* partially relied in this respect on the rejection of the Sherman amendment, the essential burden of *Monell* is that the Sherman amendment had little if anything to do with section one of the 1871 Act. Among other things, *Monell* points out that "the nature of the obligation created by that amendment was vastly different from that created by § 1," *id.*

at 2022, that the amendment would have made municipalities liable for acts of a few private citizens, that it did not purport to amend section one, and that many supporters of section one opposed the amendment. *Id.* 2023-32. *Monell* also relied on the conclusion that "creation of a federal law of *respondeat superior* would have raised all the constitutional problems associated with" the Sherman amendment. *Id.* at 2037. But whatever constitutional problems the imposition of *respondeat superior* liability on municipalities would have posed respecting the 1871 Act, it is plain that such problems would have likewise been perceived respecting the 1866 Act, as the latter had only the Thirteenth Amendment to rely on, while the 1871 Act additionally had the Fourteenth Amendment.

Monell further references "the absence of any language in § 1983 which can easily be construed to create *respondeat superior* liability." *Id.* at 2037 n. 57. This is, of course, likewise true as to section 1981. Indeed, section 1981 contains no language creating *any* liability; it is merely a declaration of rights, and does not even purport to define prohibited conduct, much less to either create a cause of action or impose or assign liability or responsibility to anyone. Again, *Monell* relies on

the "shall subject, or cause to be subjected" language of section 1983. *Id.* at 2036. But whatever significance the presence of such language in section 1983 may have necessarily derives from the fact that section 1983 purports to assign responsibility to certain parties. As noted, section 1981 does not. Section two of the 1866 Act is the only section thereof which purports to impose any responsibility for deprivation of section one rights.[2] And, it is particularly relevant in this connection that the "shall subject, or cause to be subjected" language of the 1871 Act was *borrowed* from section two of the 1866 Act. *Id.* at 2032-33; *Monroe*, 81 S.Ct. at 483; *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 90 S.Ct. 1598, 1611, 26 L.Ed.2d 142 (1970). Given this context, the "shall subject, or cause to be subjected" language should not be a basis for differentiation between sections 1981 and 1983 with respect to municipal *respondeat superior* liability.

[1] Finally, account must be taken of the context in which *Monell* dealt with the municipal liability *respondeat superior* issue. The initial and principal holding in *Monell* was that municipalities were covered by section 1983 and that a municipality was a "person" within the meaning of the statute's provision that "any person" who under color of state

---

2 Section two has been described as the "enforcement section" of the 1866 Act. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 96 S.Ct. 2574, 2583, 49 L.Ed.2d 493 (1976). And the Court has indicated that sections one and two of the 1866 Act cover the same wrongs except for the "under color of law" restriction in section two. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 2195-96, 20 L.Ed.2d 1189 (1968); *McDonald*, 96 S.Ct. at 2583. We also observe that the last clause of section one of the 1871 Act expressly references the 1866 Act.

or local law violated another's federal constitutional rights "shall . . . be liable to the party injured." This holding was partially based on the act passed in February 1871, a few months before the 1871 Civil Rights Act, providing that "in all acts hereafter passed. . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows such words were intended to be used in a more limited sense." *Id.* at 2034-35. The Court also relied in this connection on the fact that "the debates [respecting section 1983] show that Members of Congress understood 'persons' to include municipal corporations," *id.* at 2033, and that "the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities . . . to be included among those persons to whom § 1983 applies." *Id.* at 2035 (emphasis in original). Thus, the *Monell* Court dealt with a statute which expressly and intentionally included municipalities among those subjected to liability thereunder,

and contained no language expressly negating *respondeat superior*. In that context, some rather specific reasons were appropriate in order to negate municipal *respondeat superior* liability. But the section 1981 context is completely different in this respect. As noted, section one of the 1866 Act contains no language which can be construed as covering municipalities, and it does not purport to create a cause of action or to assign or impose liability or responsibility on anyone. Moreover, we are aware of no specific legislative history of section one of the 1866 Act, comparable to that of the 1871 Act, indicating an intent to impose municipal liability[3]. See Judge Sneed's concurring opinion in *Sethy v. Alameda County Water District*, 545 F.2d 1157, 1163-64 & n. 1 (9th Cir. 1976). Thus, the matter of who is liable for damages, and under what circumstances, for a deprivation of the rights declared in section one of the 1866 Act (section 1981) depends more on general considerations of likely legislative intent or

---

3 Contrast *Owen*, *supra*, where the Court, in denying municipalities qualified immunity under section 1983, reviewed the status of municipal immunity at common law. 100 S.Ct. at 1412-15. *Owen* recognized that at common law municipalities had generally had immunity, *unless withdrawn by statute*, for "governmental" (as opposed to "proprietary") and "discretionary" functions. But the Court ruled that this history did not justify giving municipalities qualified immunity under section 1983, stating: "[T]he municipality's 'governmental' immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit. Section 1983 was just such a statute. By including municipalities within the class of 'persons' subject to liability

(Cont. on pg. 42A)

on judge-made law than on specific, express legislative history or statutory language (except to the extent guidance is afforded by the "subject, or cause to be subjected" language of section two of the 1866 Act, *see* note 2, *supra*, and accompanying text). This appears to have been recognized in *Sullivan v. Little Hunting Park*, 396 U.S. 229, 90 S.Ct. 400, 405-06, 24 L.Ed.2d 386 (1969) (where the Court first authorized a damage action under section one of the 1866 Act; damages had been left open in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 2189-90 & nn. 13 & 14, 20 L.Ed.2d 1189 (1968)). *See also Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454,

---

3 (Cont. from pg. 41A) for violations of the Federal Constitution and laws, Congress - the supreme sovereign on matters of federal law - abolished whatever vestige of the State's sovereign immunity the municipality possessed." *Id.* at 1413-14. This reasoning, of course, is wholly inapplicable to section 1981, because nothing in section 1981 includes municipalities within any class.

With respect to the common law of municipal immunity for "governmental" as opposed to "proprietary" functions, it may be noted that many states recognize that school districts exercise *only* governmental, and no proprietary, functions for this purpose. See 33 A.L.R. 3d 703 at 734; *Boyd v. Gulfport Municipal School District*, 821 F.2d 308 (5th Cir. 1987). This has certainly been the rule in Texas. *See Braun v. Trustees of Victoria I.S.D.*, 114 S.W.2d 947, 950 (Tex.Civ.App. - San Antonio 1938, writ ref'd); *Garza v. Edinburg Consolidated I.S.D.*, 576 S.W.2d 916,918 (Tex.Civ.App. - Corpus Christi 1979, no writ).

160, 96 S.Ct. 2586, 49 L.Ed2d 415 (1976).

[2] We conclude that there is no reason to assume that Congress intended to impose vicarious municipal liability by section one of the 1866 Act though not so intending by section one of the 1871 Act, especially in light of then perceived constitutional problems associated with imposition of that character of municipal liability, and that the considerations enunciated in *Owen* counsel against such vicarious municipal liability, as does also the appropriateness of parallel treatment in this respect of these two post-Civil War statutes, particularly as contrasted to Title VII. See our original opinion, 798 F.2d at 762-63 & nn. 13 & 14.[4]

Accordingly, we reject Jett's complaints respecting our prior opinion's disposition of this section 1981 claim against the school district.[5]

Treating the suggestion of rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for rehearing en banc is DENIED.

---

4 As noted in our prior opinion, 798 F.2d at 763, our reasoning does not question private *respondeat superior* liability under section 1981. That issue was left open by the Supreme Court in *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982).

5 We are aware that *Springer v. Seaman*, 821 F.2d 871, 880-81 (1st Cir. 1987), declined to follow our opinion in this respect. *Springer*, however, does not persuade us to a contrary result.

The mandate shall issue forthwith.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NORMAN JETT

Plaintiff

v.

DALLAS INDEPENDENT SCHOOL DISTRICT, et al.

Defendants

CIVIL ACTION NO.

3-83-0824-H

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendants' Motion for a Judgment Notwithstanding the Verdict, for New Trial, Remand or Remittitur, filed November 2, 1984, and Plaintiff's Response, filed November 28, 1984. Defendants' post-verdict motions are directed to the Judgment entered by this Court October 23, 1984, awarding the Plaintiff $650,000.00 against Defendant Dallas Independent School District ("DISD"), $150,000.00 against Defendants Todd and DISD, jointly and severally, and $50,000.00 against Defendant Todd as compensatory and punitive damages for the violation of various constitutional rights arising out of Plaintiff's transfer from the position of head coach and athletic director at South Oak Cliff High Schooi.

The Judgment in this case granted one quantity of damages for all of the constitutional violations found by the jury. The level of these damages would be unaffected by an error concerning one or more of the theories of recovery so long as one theory remains intact. The level of damages is not calibrated to the number of theories on which Plaintiff prevailed, but rather to the extent of his injury. *Clark v. Taylor*, 710 F.2d 4, 8 (1st Cir. 1983).

On a Motion for a Judgment Notwithstanding the Verdict, the Court must review the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence. *Alman Brothers Farms and Feed Mill, Inc. v. Diamond Lab., Inc.*, 437 F.2d 1295, 1298 (5th Cir. 1971).

DISD Liability, Part I

Defendants argue that there is no legal basis for the imposition of liability on the DISD because there was no showing or finding that the injuries sustained were inflicted pursuant to official policy. *Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir. 1984).

Official policy is a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy making authority. *Id.*

The Court has no difficulty in finding this test satisfied as a matter of law. The following facts were supported by uncontroverted evidence at trial:

1.The DISD, through the Board, has delegated sole and unreviewable authority to the Superintendent to "reassign" members of the coaching staff. *See* Defendants' Brief at 15-17; Transcript at 27.

2.Plaintiff was "reassigned" in the customary way that the DISD handles such matters. Tr. at 48-49.

While the Board certainly did not authorize the Superintendent to violate constitutional rights, it did delegate the unreviewable authority to "reassign" personnel as he saw fit. *See Thomas v. Sams*, 734 F.2d 185 (5th Cir. 1984).

A very recent Eighth Circuit case held that municipal liability is appropriate when an unconstitutional employment decision was made pursuant to the city's established policy of allowing certain officials final authority to make their own personnel decisions, and thus may fairly be attributed to the city. *Williams v. Butler*, 53 U.S.L.W. 2210 (8th Cir. 1984). *Accord Rookard v. Health and Hospitals Corp.*, 710 F.2d 41, 45 (2d Cir. 1983).

Even if the imposition of municipal liability under § 1983 were incorrect, such liability is permitted on solely a basis of *respondeat superior* when the claim is one of racial discrimination under § 1981. Plaintiff has prevailed on such a claim here. *See Garner v. Giarrusso*, 571 F.2d 1330, 1341 (5th Cir. 1978); *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977); *Haugabrook v. City of Chicago*, 545 F.Supp. 276 (N.D. Ill. 1982).

Todd Liability

Defendants argue that Defendant Todd is not subject to individual liability because he did not make the ultimate decision to transfer and terminate Plaintiff, but only provided recommendations to his superiors. This is incorrect. While

Defendants can make any recommendations they wish for no reasons whatsoever, Defendants cannot take any action for constitutionally impermissible reasons. *See Perry v. Sindermann*, 408 U.S. 593, 598 (1972); *Gray v. Union County Intermediate Education District*, 520 F.2d 803 (9th Cir. 1975). In *Swilley v. Alexander*, 629 F.2d 1018, 1021 & n.3 (5th Cir. 1980), the court found a letter of reprimand to be an actionable first amendment violation. *Accord Yoggerst v. Stewart*, 623 F.2d 35, 39 (7th Cir. 1980) ("Yoggerst I"); *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970).

> One judge has forcefully written of the interests at stake:
>
> Any time government action adverse to an employee is taken in direct response to the employee's exercise of free speech, an unmistakeable message is subtly telegraphed to the employee warning that open communication of his views will result in punishment by the government. The warning constitutes a violation regardless of whether it is heeded. . . . "Rights are infringed where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason." *Elrod v. Burns*, 427 U.S. 347, 360 n.13 (1976) (plurality opinion).

MReichert v. Draud, 701 F.2d 1168, 1173 (6th Cir. 1983) (Krupansky, J., dissenting).

Liability for the recommendation alone is justified when the final action is taken, as the jury found here, solely on the basis of that improper recommendation. *Hickman v. Valley Local School District*, 619 F.2d 606, 610 (6th Cir. 1980); *Dick v. Watonwan Cty.*, 562 F.Supp. 1083, 1100 (D.Minn. 1983), *reversed on other grounds*, 738 F.2d 293 (8th Cir. 1984).

Defendants further argue that Defendant Todd is not subject to individual liability because of the application of the good faith immunity defense. Todd's individual liability is predicated on the claims of racial discrimination and first amendment violations. Defendants' arguments concerning the "closeness" of the property interest question are irrelevant.

The affirmative defense of good faith immunity is available to the extent that the official's conduct does not violate clearly established constitutional rights, of which a reasonable person would have known. *Davis v. Scherer*, 104 S.Ct. 3012 (1984). The reasonableness of the conduct is measured on a strictly objective standard. *Id.* at 3018.

The rights in question are clearly established. Regardless of the factual arguments raised by Defendants regarding the shared admiration and lack of animosity by all concerned to Plaintiff, the jury's finding that Defendant Todd did not sufficiently prove his good faith defense is supported by the evidence.[1]

Property Interest

Defendants renew their oft-raised argument that Plaintiff did not and cannot prove a property interest in his employment as head coach and athletic director sufficient to trigger due process protection. Superintendent Wright, however, conceded that there was an oral contract for Plaintiff to serve as head coach and athletic director through the 1982-1983 school year.Tr. 2-5. Plaintiff received a supplementary pay stipend of $4,773.00 in consideration of this service. This arrangement certainly constituted more than a mere unilateral expectation

---

1 The viability of the race and free speech theories is discussed *infra*.

of remaining in the position for the school year. *See Board of Regents of State College v. Roth*, 408 U.S. 564 (1972); *Thomas v. Fort Worth Trustees*, 515 F.Supp. 280 (S.D.Tex. 1981).

The evidence further showed that Plaintiff was removed from that position prior to the end of that contractual term. The proof at trial further demonstrated that Plaintiff had one year remaining (through 1983-1984) on his written contract of employment as a teacher, that the five-year teacher contract would ordinarily be renewed in the absence of good cause for nonrenewal, Tr. 114-115 (yielding a further property interest, *Bueno v. City of Donna*, 714 F.2d 484 (5th Cir. 1983)), and that he was constructively terminated from that employment.

Defendants further argue that Plaintiff received any due process that may have been required. As Plaintiff observes, Defendants mischaracterized the Supreme Court's holding in *Davis v. Scherer*, 104 S.Ct. 3012, 3019 (1984). Although the Supreme Court has yet to specifically delineate the due process requirement in the employment context, the Fifth Circuit has established minimum pretermination procedural elements or "risk reducing procedures". *Bueno v. City of Donna*, 714 F.2d at 493. The Court instructed the jury pursuant to these criteria, the jury found that Plaintiff did not receive the process due, and the Court has no quarrel with that finding.

Waiver

Defendants argue that Plaintiff waived his constitutional rights. The standard for an effective waiver is the "intentional relinguishment of a known right or privilege". *Bueno v. City of Donna*, 714 F.2d at 492. Such an alleged waiver is subject to the most stringent scrutiny; the record must reflect the basis for the conclusion of actual knowledge of the existence of the right, full understanding of its meaning, and clear com-

prehension of the consequence of the waiver. *Id.* The record certainly does not support such a conclusion. *See* Tr. 29.

Equal Protection

Defendants argue that Plaintiff did not satisfy the elements of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in proving that the recommendation to transfer him was racially motivated. Plaintiff does not have to touch the four *McDonnell Douglas* bases. The formula used in that and other cases is merely one way to establish a prima facie case of employment discrimination that is often elusive because of the absence of more direct proof. *See Ramirez v. Sloss*, 615 F.2d 163, 167 (5th Cir. 1980). The eventual destination that a Plaintiff must reach, no matter what the route, is the proof by a preponderance of the evidence that he was discriminated against. The questions asked of the jury were addressed directly to that conclusion, and the evidence was sufficient to support the finding.

First Amendment

Defendants argue that there is insufficient evidence to support the jury's answer that the Plaintiff's exercise of first amendment rights was a substantial motivating factor in Dr. Todd's recommendations. Defendant Todd clearly testified

that certain remarks attributed to Plaintiff in newspaper articles were a "substantial motivating factor" in his decision.

Defendants argue that these statements were not on matters of public concern, and thus unworthy of any protection.[2] The definition of the scope of first amendment protection given teachers is found in *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Pickering*, a teacher wrote a letter to a local newspaper in connection with an impending property tax increase, questioning the school board's budgetary judgments. After a Board hearing determined his action to be "detrimental to the efficient operation and administration of the schools of the district", he was dismissed. The state court upheld the dismissal. The Supreme Court, per Justice Marshall, reversed: "To the extent [the state court's opinion suggests] that teachers may constitutionally be compelled to relinquish the first amendment rights they would otherwise enjoy as citizens to comment on *matters of public interest*, [it] proceeds on a premise that has been unequivocably rejected." (Emphasis added).

The most recent Supreme Court pronouncement on the constitutional protection afforded public employee speech is *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983). Myers was an Assistant District Attorney, employed for 5 1/2 years, serving at the pleasure of District Attorney Connick. In October 1980, she was informed that she would be transferred to another division of the office. She objected to her superiors,

2 Defendants do not argue that any first amendment interest Plaintiff possessed was outweighed by Defendants' interest in orderly management of the workplace. *See generally Tate v. Yenoir*, 537 F.Supp. 306, 308 (E.D.Mich. 1982).

expressed her reluctance to accept the transfer, and announced that she would research general dissatisfaction in the office. She distributed a questionnaire to employees, causing one of her supervisors to report to D. A. Connick that Myers was creating a "mini-insurrection". Myers was subsequently dismissed.

The Court, in a 5-4 decision by Justice White, finding no constitutional violation, distinguished *Pickering*:

> *Pickering's* subject was "a matter of legitimate public concern" upon which "free and open debate is vital to informed decision-making by the electorate." *[Pickering]*, its antecedent and progeny, lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constitutional speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of *political, social, or other concern to the community*, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the first amendment. 103 S.Ct. at 1690. (Emphasis added).
>
> • • •
>
> We hold only that when a public employee speaks not as a citizen upon matters of public concern but instead as an employee upon matters of *personal interest*, absent the most usual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

While, as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the first amendment does not require a public of-

Thus, *Connick's* relevant contribution to *Pickering* is essentially incremental. *Gonzales v. Benavides*, 712 F.2d 142 (5th Cir. 1983). Seizing upon language over which the *Pickering* court did not expend great analytical effort, the Supreme Court decided that the individual's right as a citizen, protected by the first amendment to the extent that it is not outweighed by the government's interest as an employer, is only a right to speak out on matters of public concern. (Actually, *Pickering* spoke more frequently of matters of public "interest" or "importance").

The first incident in this case concerned remarks attributed to Plaintiff in a newspaper interview concerning the perceived future impact of new NCAA academic standards and their impact on minority students. In addition to Plaintiff, other educational leaders in the community and beyond were interviewed. The standards in question were to be applied nationally.

The matter is clearly of "public concern". It addresses matters of national academic and athletic policy of interest to many beyond Plaintiff, Todd, South Oak Cliff and Dallas. It does not concern Plaintiff or any grievance he had with anyone. *Compare Bickel v. Burkhart*, 632 F.2d 1251, 1256-58 (5th Cir. 1980) (institutional criticism) *with Smalley v. Eatonville*, 640 F.2d 765, 768 (5th Cir. 1981) (personnel criticism). *See also, Micilcavage v. Connelie*, 570 F.Supp. 975, 978 (N.D.N.Y. 1983); *Collins v. Robinson*, 568 F.Supp. 1464 (E.D.Ark. 1983), *affirmed*, 734 F.2d 1321 (8th Cir. 1984).

The second item concerned a public quote by Plaintiff comparing his South Oak Cliff defensive line to that of SMU, and his offense to that of the Dallas Cowboys. While this issue does not implicate any weighty matters of public policy, "public concern" should not be equated with "actual interest". *Egger v. Phillips*, 710 F.2d 292 (7th Cir. 1983), *cert. denied*, 104

S.Ct. 284 (1983). As long as the speech was not of purely private concern, and it was significant enough for employment action to be taken in response, the speech is sufficiently significant to merit first amendment protection. *See McGee v. South Pemiscot School District*, 712 F.2d 339 (8th Cir. 1983) (distinguishing *Connick* on its facts and holding that the "fate of junior-high track" had become of public concern).

Defendants argue that the NCAA remarks were "false" and thus were not entitled to constitutional protection.Mere falsehood will not bar such protection; proof is required that the false statements were knowingly or recklessly made. *Pickering*, 391 U.S. at 1738; *Gates v. City of Dallas*, 729 F.2d 343, 346 (5th Cir. 1984). There is absolutely no proof of any such knowing or reckless falsehood.

Academic Freedom

Defendant Todd admitted that Plaintiff's departure from a previously practiced game plan in a match against Plano figured in his decision. Plaintiff asserts that such retaliation for an exercise of instructional discretion is an impermissible first amendment violation. The evidence, however, showed that Defendant Todd's actions concerned not the substance or methodology that Plaintiff chose to apply as coach, but complaints and protests that Defendant Todd had received in reaction to Plaintiff's change of plans. This sort of disruptive effect on students is a proper subject of concern and action by school administrators. *See Tinker v. Des Moines Ind. Comm. School Dist.*, 393 U.S. 503 (1969).

Without addressing the question of whether unadulterated Monday morning quarterbacking can rise to the level of a constitutional violation, the Court finds that there is no evidence to support a finding of a violation of academic freedom. The validation of the findings on the other first

amendment issues, however, renders this conclusion of no consequence to the judgment.

DISD Liability, Part II

Defendants next raise the argument that there is no evidence to support the findings that the DISD acted solely on the basis of Defendant Todd's recommendation without any independent investigation, and that the DISD's actions would not have been taken absent the impermissible considerations.

The evidence showed that there was no independent investigation undertaken. Santillo testimony, Tr. 82-83. Where the issue of Plaintiff's fate was before the Superintendent solely because of an impermissible recommendation from the principal, the impermissible reasons are attributable to the Superintendent (and thus the District under § 1981). *Hickman v. Valley Local School District*, 619 F.2d 606 (6th Cir. 1980). *See also Arnett v. Kennedy*, 416 U.S. 134, 216 (1974) (Marshall, J., dissenting) ("The need for an independent decisionmaker is particularly crucial in the public employment context, where the reason for the challenged dismissal may well be related to some personal antagonism between the employee and his superior.").

Constructive Termination

Defendants argue that there is insufficient evidence to support the jury's finding that Plaintiff was constructively terminated from his employment in August 1983. The Court's instruction was in line with current Fifth Circuit authority. The question of how a reasonable person would have felt in Plaintiff's situation is inherently and inexorably a question of fact; the Court cannot say that, considering all of the circumstances facing Plaintiff, that the jury's finding is unsupportable.

Damages

Defendants argue that there is insufficient evidence to support the imposition of $50,000.00 in punitive damages against Defendant Todd. There is absolutely no evidence that Defendant Todd's actions were taken in a malicious, wanton or oppressive manner.

Next, Defendants assert that the jury's award of $150,000.00 against Defendant Todd and $650,000.00 against Defendant DISD are duplicative awards of damages, resulting in irreconcilable findings. The Court is of the opinion that these damages are redundant, though not irreconcilable. The DISD acted on and incorporated Todd's impermissible recommendation and the damages compensate part of the same intangible injuries sustained by Plaintiff. Plaintiff suggests that this problem can be remedied by reforming the judgment to make the DISD liable for damages in the sum of $650,000.00, of which Todd would be jointly and severally liable for $150,000.00. Response at 73 n.2. The Court is of the opinion that such a reformation cures the problem.

Motion for New Trial

Defendants assert that the amount of the jury verdict is excessive and have moved for a new trial or, in the alternative to reduce the jury award to $25,000.00.

In this circuit, the standard for granting a remittitur is the same in the trial court or on appeal:

> The jury's award is not to be disturbed unless it is entirely disproportionate to the injury sustained. We have expressed the extent of such distortion that war-

rants intervention by requiring such awards to be so large as to "shock the judicial conscience", "so gross or inordinately large as to be contrary to right reason", so exaggerated as to indicate "bias, passion, prejudice, corruption, or other improper motive", or as "clearly exceed[ing] that amount that *any* reasonable man could feel the claimant is entitled to.

(Emphasis in original). *Hanson v. Johns-Manville Products Corp.*, 734 F.2d 1036 (5th Cir. 1984), *reh. denied*, 774 F.2d 94 (5th Cir. 1984).

The process by which these standards are to be applied has been explained as follows:

> Unless we are to accept any verdict, in whatever amount, as a legally acceptable measure, we must review the amount of jury awards. Reassessment cannot be supported entirely by rational analysis. It is inherently subjective in large part, involving the interplay of experience and emotions as well as calculation. The sky is simply not the limit for jury verdicts. . . .

Id.

After the reformations noted above, the judgment stands as follows:

> $250,000 against Defendant DISD for mental anguish and damage to reputation prior to August 20, 1983, of which Defendant Todd is jointly and severally liable for $150,000.
>
> $400,000 against Defendant DISD for lost earnings, mental anguish and damage to reputation after August 20, 1983.

The evidence that Plaintiff sustained $294,000 in damages for lost earnings was not controverted.

Damages may also be awarded for mental distress resulting from a deprivation of constitutional rights. *Solis v. Rio Grande City Indep. School*, 734 F.2d 243 (5th Cir. 1984).

Excessiveness is not determined by comparing verdicts rendered in different cases, each case must be determined on its own facts. *Sosa v. M/V Lago Izabel*, 736 F.2d 1028, 1035 (5th Cir. 1984). Without adhering to any notion of mathematical parity, the Court is compelled to note that this verdict is far in excess of that in other cases one would consider comparable. *See Barnett v. Housing Authority of the City of Atlanta*, 707 F.2d 1571 (11th Cir. 1983) ($75,000 actual damages); *Simineo v. School District No. 16*, 594 F.2d 1353 (10th Cir. 1979) ($60,000); *Miller v. City of Mission, Kansas*, 516 F.Supp. 1333 (D.Kans. 1981) ($190,000). In *Wells v. DISD*, Civil Action No. 3-79-1401-G, the Court reduced a jury verdict of damages for past and future mental anguish, injury to reputation and career to $250,000 from $1,050,000.

The Court concludes that the $356,000 of the verdict compensating items other than lost earnings is excessive and should be reduced when considered in light of the facts of this case.

Defendants argue that a determination of excessiveness of damages mandates a new trial on the entire case, citing *Lowe v. General Motors Corp.*, 624 F.2d 1373 (5th Cir. 1980). This is not quite the teaching of *Lowe*. Judge Brown clearly approved of the use of remittiturs to cure "grossly excessive" verdicts resulting not from bias, passion or prejudice, but from the similar although distinct question of "just too much". 624 F.2d at 1383. Of course, if a plaintiff refuses to remit, the court may order a new trial strictly on the issue of damages.

Accordingly, the Court has determined that a new trial on the issue of damages should be granted unless Plaintiff files a remittitur of $200,000 of the $650,000 awarded against Defen-

dant DISD, including $100,000 awarded jointly and severally against Defendant DISD and Todd.

Other Grounds for New Trial

Defendants urge several other grounds for a new trial, pursuant to Rule 59, Fed.R.Civ.P.

The first objection is the admission of the newspaper article containing the purported quote of Plaintiff on the new NCAA standards on the grounds that it was replete with hearsay.

The article in question was admitted not to prove the truth of the matter asserted, but to demonstrate the content of the comments that admittedly were a "substantial motivating factor" in Defendant Todd's recommendation, and to prove that they constituted protected conduct. The truth of the statements is irrelevant. *Williams v. City of Valdosta*, 689 F.2d 964, 972 n.5 (11th Cir. 1982). Moreover, the Court recalls that an appropriate limiting instruction was requested and given.

Defendants also argue that the article was unduly prejudicial under Rule 403, Fed.R.Evid., because it tended to suggest that there was a division of opinion along racial lines on the issue of whether black students could pass certain NCAA standards. The Court disagrees.

Defendants next argue that the admission of out-of-court statements by Mr. Couch should have been excluded because there was no showing that he was acting within an agency capacity for Defendants in making such statements. Although this objection was not stated as such at trial, and is presumably waived, it would not be grounds for a new trial because the same testimony came in through the testimony of Superintendent Wright. Thus, even if Defendants' objection was timely, they protest harmless error. *United States v. Truitt*, 440 F.2d 1070 (5th Cir. 1971), *cert. denied*, 404 U.S. 847 (1972).

Moving right along, Defendants object to the admission of the testimony of Plaintiff's economic expert concerning lost earnings after August 1983, stating that "Plaintiff voluntarily resigned on August 19, 1983". The jury did not share that view.

Instructions

Defendants further protest the instructions concerning the imposition of district liability. As discussed above, there are adequate grounds for imposing municipal liability as a matter of law, and, further, Defendants' arguments do not address liability under § 1981. Moreover, Defendants did not submit a requested issue on this question.

Next, Defendants state that the Court erred in instructing that due process requires the right to respond "in writing" to the charges, citing *Davis v. Scherer*. As noted above, *Davis* did not delineate the constitutional minimia for due process in employment termination cases. The Court's instruction was based on the current Fifth Circuit authority.

Third, Defendants protest the instructions concerning free speech, particularly the failure to instruct that such speech must be truthful and accurate to be protested. Defendants are incorrect in their statement of the law.

Motion to Remand

Alternatively, Defendants move to remand the case to the School Board for further hearings. Defendants cite *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970):

> If a procedural deficit appears, the matters should, at that point, be remanded to the institution for its compliance with minimum federal or supplementary academically created standards. This should be done

so that the matter can first be made ripe for court adjudication by the school authorities themselves.

430 F2d at 858.

The Court does not find *Ferguson* controlling here. Defendants have steadfastly maintained for months that no procedural due process was required in this case, despite Plaintiff's arguments to the contrary. The procedural deficit "appeared" long ago. The concerns of the *Ferguson* panel -- that ideally a school district should be given the first opportunity to cure a procedural deficit before resort to a federal court -- are not served by what Defendants seek. In essence, Defendants suggest that they should be entitled to try their luck with a test case in federal court and, if the result is unfavorable, retreat to District procedures for an opportunity to negate Plaintiff's successes. The procedural deficit has now been remedied by this Court. *Fluker v. Alabama State Board of Education*, 441 F.2d 201, 208 n.15 (5th Cir. 1981).

Finally, the alternate grounds supporting the judgment beyond the procedural due process violation would render any remand exercise meaningless.

Accordingly, the Court is of the opinion that Defendants' Motion for Judgment Notwithstanding the Verdict should be, and hereby is, GRANTED to the extent that the award of $50,000.00 in punitive damages against Defendant Todd is set aside as unsupported by the evidence, the award of $150,000 in actual damages against Defendant Todd is set aside as duplicative, and the judgment should be reformed to reflect actual damages in the amount of $650,000 against Defendant DISD, of which Defendant Todd is jointly and severally liable for $150,000.

Defendants' Motion for New Trial is GRANTED on the issue of damages, unless Plaintiff files a remittitur of $200,000 awarded against Defendant DISD, including $100,000

awarded jointly and severally against Defendants DISD and Todd. Defendants' Motion is, in all other respects, DENIED.

Defendants' Motion for Remand is DENIED.

SO ORDERED.

DATED: December 10, 1984.

/s/ BAREFOOT SANDERS
UNITED STATES DISTRICT COURT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA3-0824-H

NORMAN JETT

v.

DALLAS INDEPENDENT SCHOOL
DISTRICT, ET AL.

AMENDED REFORMED JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Barefoot Sanders, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, a judgment in accordance with the jury verdict was signed by this Court on October 23, 1984. Thereafter, pursuant to the mandate of this Court's Memorandum Opinion and Order dated December 10, 1984, granting in part Defendants' Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, Plaintiff filed his remittitur and the judgment previously signed by this Court on October 23, 1984, was reformed as set forth in the Reformed Judgment signed by this Court on December 17, 1984. In addition to the amount of damages awarded to the Plaintiff in said Reformed Judgment, Plaintiff was also awarded "his costs of Court, including reasonable attorneys' fees as determined by this

Court." Thereafter, on January 31, 1985, this Court dictated into the record its award to Plaintiff of his costs of court, including reasonable attorneys' fees, havaing reviewed Plaintiffs' Motion with Supporting Brief and Affidavits for Award of Attorneys' Fees, and Defendants' Response, and Amended Response, thereto. Accordingly, the Reformed Judgment signed by this Court on December 17, 1984, is amended as set forth below:

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Plaintiff, Norman Jett, recover of and from Defendant Dallas Independent School District the sum of $450,000.00, with interest thereon at the rate of 9.5% per annum from December 17, 1984, until paid.

IT IS FURTHER ORDERED that Defendant Frederick Todd is jointly and severally liable for $50,000.00 of said $450,000.00 awarded against the Defendant Dallas Independent School District and that, therefore, Plaintiff Norman Jett have and recover of and from Defendant Frederick Todd the sum of said $50,000.00, with interest thereon at the rate of 9.5% per annum from December 17, 1984, until paid.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff recover of and from Defendants Dallas Independent School District and Frederick Todd, jointly and severally, his costs of court, including reasonable attorneys' fees, through this date, in the sum of $112,870.45, with interest thereon at the rate of 9.5% per annum from December 17, 1984 until paid.

SIGNED this the 7th day of February, 1985.

/s/ Barefoot Sanders
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1015

D.C. Docket No. CA3-83-0824-H

NORMAN JETT,
Plaintiff-Appellee,

versus

DALLAS INDEPENDENT SCHOOL DISTRICT
AND FREDERICK TODD,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

Before GEE, RANDALL and GARWOOD, Circuit Judges.
JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that costs on appeal be taxed one-third against appellant Todd and two-thirds against appellee Jett, said costs to be taxed by the Clerk of this Court.

August 27, 1986

ISSUED AS MANDATE: February 5, 1988

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 85-1015

DALLAS INDEPENDENT SCHOOL DISTRICT
AND FREDERICK TODD,

Appellants,

VS.

NORMAN JETT,

Appellee.

Appeal from the United States District Court
for the Northern District of Texas
Dallas Division

SUGGESTION FOR REHEARING EN BANC

FRANK M. GILSTRAP
SHANE GOETZ

Hill, Heard, Oneal,
Gilstrap & Goetz
1400 West Abram Street
Arlington, Texas 75013
817/261-2222

ATTORNEYS FOR APPELLEE

STATEMENT OF ISSUES ASSERTED TO MERIT
EN BANC CONSIDERATION

1. Must a plaintiff seeking recovery against a local government for employment discrimination under 42 U.S.C. § 1981 prove that the racial discrimination resulted from the employer's "policy or custom"?

2. Did the panel disregard binding precedent in *Garner v. Giarusso*, 571 F.2d 1330 (5th Cir. 1978)?

STATEMENT OF THE COURSE OF
PROCEEDINGS AND DISPOSITION OF THE CASE

The panel opinion correctly sets forth the course of proceedings and disposition of the case. Slip op. at 9000-9001, 9019-9020. [App. 5A, 31-32A].

STATEMENT OF FACTS NECESSARY
TO ARGUMENT OF THE ISSUES

The panel opinion sets forth all facts necessary to argument of the issues. Slip op. at 8998-9001. [App. 2-5A].

ARGUMENT AND AUTHORITIES

1. The panel errs in grafting *Monell's* "policy" requirement onto 42 U.S.C. § 1981.

The panel holds that Part II of *Monell*,[1] which was intended to apply to 42 U.S.C. § 1983, is also applicable to 42 U.S.C. § 1981 claims against local governments. Slip op. 9017-9018. [App. 27-30A]. To recover against a municipality or school board under § 1981, an employee must now show that the racial discrimination resulted from an "official municipal policy." *Id.* at 9016. [App. 27A]. Jett's § 1981 claim against DISD thus becomes the same as his § 1983 claim for deprivation of his Fourteenth Amendment right to equal protection. *But see, Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 n.5, 88 S.Ct. 2186, 20 L.Ed.2d 1189, 1192 n.5 (1968).

In seeking to graft a rule developed under § 1983 onto a case under § 1981, the opinion encounters serious difficulty with the latter statute. The problems manifest themselves in the striking anomaly that results from this decision: private employers are subjected to a more demanding racial discrimination standard that are public employers. Slip op. at 9018. [App. 30A]. If a high school principal transfers a head coach to ninth grade coach because of race, the school district is not liable unless the transfer implemented "policy" or "practice". If, however, a corporate supervisor transfers an employee to a less favorable job because of race, the corporation is liable regardless of its policy. *But see, Garner v. Giarusso*, 571 F.2d 1330, 1341 (5th Cir. 1978).

The opinion reasons "that the Supreme Court's interpretation in *Monell* of Congress' intent in enacting Section 1983 provides compelling reasons for distinguishing between private and municipal liability under Section 1981." Slip op.

---

1 *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)

at 9018. [App. 30A]. We must therefore reread *Monell* and its predecessor, *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, which held that local governments were not liable under § 1983 because they were not "persons" as defined in that statute. 355 U.S. at 187. Monroe's holding came after a review of the Congressional debates accompanying the Ku Klux Klan Act of 1871 (Section 1 of which became § 1983) and particularly the defeat of the "Sherman Amendment."[2]

Seventeen years later in *Monell*, the Court concluded that it had misread history. The rejection of the Sherman Amendment had been based, not upon a fear that municipalities might be held liable for damages, as *Monroe* had concluded, but upon a fear of compelling local governments to enforce federal law in violation of the then viable constitutional doctrine of "dual sovereignty", 436 U.S. at 669, 98 S.Ct. at 2025. Congressional intent was found to have been far *broader* than originally supposed. "Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." 436 U.S. at 690, 98 S.Ct. at 2035 (emphasis in the original).

The Sherman Amendment was not forgotten. It was used to bolster *Monell's* important new emendation: "When Congress' rejection of the only form of vicarious liability presented to it

---

2 In its original version the Sherman Amendment would have made the "'inhabitants of the county, city, or parish' in which certain acts of violence occurred liable 'to pay full compensation' to the person damaged." *Monroe*, 365 U.S. at 188, and in its second version it would have made "the county, city or parish" itself "liable to pay full compensation to the person or persons damnified by such offense." *Id.* at 188 n.41. *See Monell*, 436 U.S. at 702, 98 S.Ct. at 2041.

[the Sherman Amendment] is combined with the absence of any language which can easily be construed to create respondeat superior liability, the inference that Congress did not intend to impose such liability is quite strong." *Monell*, 98 S.Ct. 2037 n.57, quoted in Slip op. at 9017. [App. 27A]. Thus, local governments are directly liable under § 1983 only when their unconstitutional actions implement or execute a "policy" or "custom". *Monell*, 436 U.S. at 690, 98 S.Ct. at 2035-2036.

If the analysis of legislative intent undertaken in *Monroe* and *Monell* was "fraught with difficulties", 436 U.S. at 675, 98 S.Ct. at 2028, the task contemplated by the panel is even more demanding. Here Congress' rejection of the Sherman Amendment is not used to construe the statute that was before Congress in 1871, i.e., Section 1 of the Ku Klux Klan Act (now § 1983). Rather, it is used to construe Section 1 of the Civil Rights Act of 1866 (now §§ 1981 and 1982).[3] Moreover, the

---

3 The legislative history of § 1981 was settled in *Runyon v. McCrary*, 427 U.S. 160, 168-170, 295, 96 S.Ct. 2586, 2593-94, 49 L.Ed.2d 415 (1976), just as the identical legislative history of 42 U.S. § 1982 had been settled in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-437, 88 S.Ct. 2186, 2194-2202, 20 L.Ed.2d 1189, 1198 (1968). *See also District of Columbia v. Carter*, 409 U.S. 362, 421, 93 S.Ct. 602, 604 (1973); *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431, 438-40, 93 S.Ct. 1090, 1095, 35 L.Ed. 403 (1973); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287-296, 96 S.Ct. 2574, 2582-2586, 49 L.Ed.2d 293 (1976); and *General Bldg. Contractors Assn., Inc. v. Pennsylvania*, 458 U.S. 375, 383-390 407-414, 102 S.Ct. 3141, 3146-49, 3159-62, 73 L.Ed.2d 835 (1982).

analysis of this complex problem is reduced to just two sentences.

> The *Monell* court concludes that in 1871 when Congress enacted what is now codified as § 1983, which was five years after it had enacted the statute that became § 1981, Congress did not intend municipalities to be held liable for constitutional torts committed by its employees in the absence of official municipal policy. To impose such vicarious liability for only certain wrongs based on § 1981 would contravene the congressional intent behind § 1983.

Slip op. 9017-18 (emphasis added). [App. 29A]. While the first sentence accurately summarizes the conclusions of *Monell*, it implies that *Monell* also considered the 1866 Act, which it did not.[4] The second sentence summarizes the conclusions of the panel, not of *Monell*.

Of course, the same argument was made prior to *Monell* in a series of cases in which defendants attempted to extend *Monroe's* "municipal immunity"[5] to claims arising under § 1981. Thus, in *Garner v. Giarusso*, 571 F.2d 1330 (5th Cir.

---

4 The slip opinion also misspeaks at p. 9016 [App. 27A] when it says that "[i]n *Monell*, the Supreme Court carefully examined the history of § 1981 [sic] and concludes that . . . Congress did not intend for a municipality to be held liable unless action pursuant to official municipal policy caused a constitutional tort." The panel surely meant "§ 1983", not "§ 1981".

5 Those cases used the term "immunity", as does *Monell*. Apparently since local governments were not liable under § 1983 after *Monroe*, they were considered "immune".

1978), this court analyzed the defeat of the Sherman Amendment and concluded that the argument that § 1983 had somehow modified § 1981 was "wholly without support in either the Supreme Court's § 1983 cases, the wording of § 1981, or its legislative history." 571 F.2d at 1339. The argument was also rejected in *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157, 1160-61 (9th Cir. 1976) (en banc) ("[T]here is no basis for finding an implied repeal of any rights created by § 1981 into the failure of Congress in 1871 to force municipal liability under § 1983 upon states that did not at that time permit actions against municipalities"); and *Mahone v. Waddle*, 564 F.2d 1018, 1031 (3rd Cir. 1977). *See also, Campbell v. Gadsden County Dist. School Board*, 534 F.2d 650, 653-654 n.8 (5th Cir. 1976); and *United States v. City of Chicago*, 549 F.2d 415, 425 (7th Cir. 1977).

Yet, this same argument carries the day in *Jett*. Why is the reasoning of *Garner, Sethy*, and *Mahone* rendered suddenly worthless by *Monell*? *Monell* had nothing to say about § 1981

and resulted -- it is easy to forget -- in significantly *expanded* liability for local governments under § 1983. The panel simply offers no reason why "repeal by implication"[6] rejected prior to *Monell*, somehow becomes viable now.

The panel also fails to note that both *Monell* and *Monroe* turned upon "the language of § 1983 as originally passed:

[A]*ny person who*, under color of any law, statute, ordinance, regulation, custom, or usage of any state, *shall subject or cause to be subjected*, any person . . . to the deprivation of any rights . . ."

436 U.S. at 691, 98 S.Ct. at 2036 (emphasis in *Monell*). *Monroe* held that municipalities were not liable because they were not "persons" as used in this statute. *Monell* concluded that a municipality was a "person" but that the language "shall subject or cause to be subjected" meant that Congress had intended to require that liability be imposed only for conduct

---

6 The difficult test for "repeal by implication" is set forth in *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 336, 80 L.Ed. 351, 355 (1936). *See also, Jones v. Alfred H. Mayer*, 392 U.S. at 437, which rejected the claim that Congress intended to exempt private persons from the operation of the Civil Rights of 1866, when the statute was reinacted as the Enforcement Act of 1970; *cert. denied*, 401 U.S. 948 (1971). *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097, 1100 (5th Cir. 1970), which held that "by enacting Title VII of the 1964 Civil Rights Act, Congress did not repeal the existence of a private cause of action under 42 U.S.C. § 1981", and *Waters v. Wisconsin Steel Works*, 427 F.2d 476, 484 (7th Cir. 1970), *cert. denied* 400 U.S. 911 (1971) (same).

taken pursuant to municipal "policy or practice." Yet, these considerations are simply inapposite to § 1981.

Nor does the language of § 1981 lend itself to that interpretation. Whereas § 1983 speaks in terms of "persons" who are subjected to liability, § 1981 uses the word "persons" to describe those who are benefited by the enactment. *See Garner*, 571 F.2d at 1340. *See also, Mahone*, 564 F.2d at 1030. Again, we are not told just how *Monell* has changed this.

Since the panel's conclusion is not supported by analysis of the 1871 congressional debates, is there support in the debates of the 39th Congress which passed §§ 1981 and 1982? The legislative intent of this first Reconstruction Congress has been considered at length in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), and by exhaustive commentary.[7] Yet, this legislative history only serves to undercut the panel's reasoning. Contrary to the panel's opinion, Congress *did* intend to treat "a few types of violations" differently from other types of "'federal' wrongs". Slip op. at 9017. [App. 29A].

"The First Session of the Thirty-Ninth Congress met on December 4, 1865, some six months after the preceding Congress had sent to the states the Thirteenth Amendment, and a few days before word was received of the Amendment's ratification." *Jones*, 392 U.S. at 455, 20 L.Ed.2d at 1216. "On January 5th, Senator Trumbull introduced both the

---

7 *See e.g.*, Bickel, *The Original Understanding and the Segregation Decision*, 69 Harvard L. Rev. 1 (November 1955); Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last: Jones v. Alfred H. Mayer Co.*, 55 Virginia L. Rev. 272 (1966); and 6 Fairman, *Reconstruction and Reunion, 1864-88, Part 1, History of the Supreme Court of the United States*, 1117-1259.

Freedmen's Bill and the Civil Rights Bill." *Id.* at 456, and on April 9, 1866, the Civil Rights Act of 1866 was passed. Stat. L. 27 (1865), later codified as 16 Stat. 144, Civil Rights Act of 1870, § 16. Section 1 of the Act contains statutory language now codified as 42 U.S.C. §§ 1981 & 1982. It guarantees to "all persons . . . the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, hold, and convey real and personal property." One of these enumerated rights, the "right to make and enforce contracts", would later be found to include racial discrimination in employment. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 95 S.Ct. 1716, 44 L.Ed. 295 (1975).

The failure of the panel's position is apparent from the language of the statute itself, which does *not* prohibit racial discrimination in all areas. It "deals only with the protection of a limited range of civil rights, including the right to make and enforce contracts," *Garner* 571 F.2d at 1340, the right to hold property, the right to sue, etc. *See also, Campbell v. Gadsden County District School Board*, 534 F.2d 650, 653-654 n.8.

Indeed, Congress in 1866 *declined* to extend the statute to cover all of the rights that had arguably been granted the newly freed slaves by the 13th Amendment. Language in the bill prohibited "discrimination in civil rights or immunities among the citizens of the United States" (emphasis added) . . . "occasioned controversy . . . because of the breadth of the phrase *'civil rights and immunities'*." *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 388, 102 S.Ct. 3141, 3149 n.15, 71 L.Ed.2d 835 (1982). (emphasis added). To eliminate the possibility that this "broad language . . . could be interpreted to encompass the right of suffrage and other political rights . . . and the difficulty growing out of any other construction *beyond the specific rights named in this section*," *Id.* (emphasis added), "the passage was removed to *narrow* the scope of the Legislation." *Id.* (emphasis in the original).

The legislative history of the 1866 Act also refutes another of the panel's conclusions, i.e., that Congress intended the 1866 Act to apply differently to governments as opposed to private persons. Yet, it is well settled that by passing Section 1 of the 1866 Act Congress intended to reach "discrimination by private owners as well as discrimination by public authorities". *Jones*, 392 U.S. at 421-422, 20 L.Ed.2d at 97.

Ultimately, the result in *Jett* appears to rest upon neither the legislative history of § 1981 nor any statutory language, but upon a belief that the panel's holding would not be "inconsistent with the Supreme Court's reasoning in *Monell*." Slip op. at 9017. [App. 27A] . Yet, *Monell* simply does not involve § 1981 and when § 1981 was considered in *General Building Contractors Association v. Pennsylvania, supra*, the Court gave no hint that *Monell* might apply to § 1981. Moreover, other circuits continue to apply § 1981 in government employment discrimination cases. *See Taylor v. Jones*, 563 F.2d 1193, 1200 [syl. 5, 6] (8th Cir. 1981); *Leonard v. City of Frankfort Elec. & Water Plant*, 752 F.2d 189, 94 n.9 (6th Cir. 1985); and *Greenwood v. Ross*, 778 F.2d 448, 456 (8th Cir. 1985). *See also, Haugabrook v. City of Chicago*, 545 Supp. 276, 279-281 (N.D. Ill. 1982), and cases there cited.

2. Garner v. Giarusso is controlling precedent

The opinion dismisses *Garner*, 571 F.2d at 1330, because it was decided "before *Monell*." Yet, the panel cannot "disregard the precedent set by a prior panel, even though it conceives error in the precedent." *Davis v. Estelle*, 529 F.2d 437, 441 (5th Cir. 1976). Nor can *Monell* constitute "intervening contrary authority from the Supreme Court," since *Monell* says nothing about § 1981. *Cf., Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981).

As its sole basis for distinguishing *Garner*, the panel notes that *Garner* "did not address whether the municipal liability could be imposed on the basis of respondeat superior," Slip op. at 9016, n.12 [App. 26A], apparently in reference to the following:

> Our holding does not pose the problem of imposing vicarious liability upon a municipality *because of the acts of its servants*. *See Hamilton v. Chaffin*, 506 F.2d 904 (5th Cir. 1975).

Garner, 571 F.2d at 1341 (emphasis added). yet, *Garner* clearly allowed some kind of "vicarious liability", since the City was held liable under § 1981 for the racially motivated actions of Garner's superior officer.Apparently, *Garner* meant to distinguish itself from cases involving vicarious liability for the "acts of *servants*." Thus, in *Hamilton v. Chaffin*, a municipality was held not to be liable under § 1983 for the acts of rank and file policemen, while in *Garner* the City was held liable for a racially motivated transfer which was made or approved by Garner's superior officer[8], i.e., a *supervisor*.

This distinction between mere "servants" and "supervisors" is crucial in many cases under both § 1981 and Title VII. *See e.g., Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979) ("[R]espondeat superior does apply here, where the action complained of was that of a supervisor authorized to hire, fire, discipline or promote, or at least to participate in or

---

8 While the opinion does not explicitly say that the transfer was made by the superior officer, the superior officer did testify as to the reasons for the transfer, 571 F.2d at 1333, and a transfer would have to be made by someone with supervisory authority.

recommend such actions."); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977) ("The defendant is liable as principal for any violation of Title VII or § 1981 by Kolkau in his authorized capacity as a supervisor."); *EEOC v. Galdis*, 733 F.2d 1373, 1380 (10th Cir. 1984) (en banc), and *Mitchell v. Keith*, 752 F.2d 385, 388 [syl. 3, 4] (9th Cir. 1985), *cert. denied* 105 S.Ct. 3502 (1986).

Whatever the precise holding in *Garner* may be, it controls in Jett; the two cases simply cannot be distinguished on their facts. As in *Garner*, Jett's supervisor, motivated by racial animus, recommended that he be "transferred". (The effect of the panel's rejection of Jett's claim that this removal from his coaching post implicated a protected property interest is to treat it as a "transfer.") Garner met with Police Chief Giarusso, to attempt to prevent his transfer, 571 F.2d at 1334, and Jett met with DISD Superintendent Linus Wright for the same purpose. Slip op. at 8999. [App. 3-4A]. Wright was informed of the possibility of racial discrimination, *Id.*, while *Garner* is not clear on this point. If anything, the operative facts are stronger in *Jett* than in *Garner*. Yet, Garner prevailed under § 1981, while *Jett* does not.

CONCLUSION

In the nine years since *Monell*, the courts have wrestled with problems that *Monell* left "for another day." 436 U.S. at 713, 98 S.Ct. at 2047 (Powell, J., Concurring.) While these problems have proved difficult, courts have at least had the "elaborate canvass of . . . legislative history," 436 U.S. at 714, 98 S.Ct. at 2048 (Rhenquist, J., dissenting), as well as the statutory language of § 1983 to guide them. If the panel's opinion in *Jett* is allowed to stand, it will effect a change as significant as *Monell* in a civil rights statute that has survived for 120 years without legislative amendment or significant judicial revision

(except for *General Building Contractors* which is inapposite to this case). Like *Monell*, *Jett* leaves difficult problems for another day. Yet, unlike *Monell*, Jett offers no guidance as to how these problems are to be resolved. The opinion refers us to *Monell*, but *Monell* cannot apply to § 1981 on any principled basis. We are told to reach *Monell's* result, but we must leave behind *Monell's* reasoning.

Moreover, the panel's apparent object, i.e., to fuse a § 1981 claim against a governmental employer into a § 1983 claim for deprivation of equal protection, is at odds with the expressed intent of the Congress that enacted § 1981. Before the Fifth Circuit allows the panel's opinion in *Jett* to stand, it should consider the dissent in *Monell*, which cautioned against abandoning a "long and consistent line of precedents," 436 U.S. at 714, 98 S.Ct. at 2048 (Rhenquist, J., dissenting), and noted that "considerations of *stare decisis* are at their strongest when this Court confronts its previous constructions of legislation." *Id.*

Rehearing should be granted, the decision of the panel vacated, and the case heard en banc.

Respectfully submitted,

HILL, HEARD, ONEAL,
GILSTRAP & GOETZ
1400 West Abram Street
Arlington, Texas 76013
817/261-2222

By:_____
Frank M. Gilstrap
Shane Goetz

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 85-1015

NORMAN JETT,

Plaintiff,
v.

DALLAS INDEPENDENT SCHOOL
DISTRICT, ET AL.,

Defendants.

ORDER OF DISMISSAL OF
DEFENDANT FREDERICK TODD

The parties having filed with the Court a Release Restricted as to Frederick Todd and Colony Insurance Company, and having requested the Court to dismiss defendant Todd from this action, it is hereby

ORDERED that defendant Frederick Todd be, and hereby is, DISMISSED, with prejudice, as a party defendant in the above-styled and numbered case.

SIGNED this 10th day of December, 1987.

/s/ Will Garwood
United States Court of Appeals
Judge

Approved as to form:

_____
Leonard J. Schwartz, Esq.
Attorney for Defendant

_____
David L. Kern, Esq.
Attorney for Colony
Insurance Company

_____
David Townend, Esq.
Attorney for Dallas
Independent School District

_____
Kurt Stallings, Esq.
Attorney for Plaintiffs

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 83-0824-H

NORMAN JETT,

Plaintiff,

v.

DALLAS INDEPENDENT SCHOOL
DISTRICT, ET AL.,

Defendants,

ORDER OF DISMISSAL OF
DEFENDANT FREDERICK TODD

The parties having filed with the Court a Release Restricted as to Frederick Todd and Colony Insurance Company, and having requested the Court to dismiss defendant Todd from this action, it is hereby

ORDERED that defendant Frederick Todd be, and hereby is, DISMISSED, with prejudice, as a party defendant in the above-styled and numbered cause.

SIGNED this 18th day of November, 1987.

/s/ Barefoot Sanders
United States District Judge

Approved as to form:

_____
Leonard J. Schwartz, Esq.
Attorney for Defendant

_____
Michael Sean Quinn, Esq.
Attorney for Colony
Insurance Company

_____
David Townend, Esq.
Attorney for Dallas
Independent School District

_____
/s/ Kurt Stallings
Frank Hill, Esq.
Attorney for Plaintiffs

APPENDIX I

SUPREME COURT OF THE UNITED STATES

No. A-802

NORMAN JETT,

Applicant,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 4, 1988.

/s/ Byron R. White
Associate Justice of the
Supreme Court of the
United States

Dated this 18th
day of April, 1988.

APPENDIX J

SUPREME COURT OF THE UNITED STATES

No. A-802

NORMAN JETT,

Applicant,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 14, 1988.

/s/ Byron R. White
Associate Justice of the
Supreme Court of the
United States

Dated this 19th
day of May, 1988.

87-2084

NO. A-802

Supreme Court, U.S.
FILED
AUG 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NORMAN JETT,
Petitioner,

V.

DALLAS INDEPENDENT SCHOOL DISTRICT,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

David W. Townend
Brown, Brown,
Chandler & Townend
1302 West Miller Road
P. O. Box 472286
Garland, Texas 75047
(214) 271-4561

Counsel For Respondent

REPLY POINTS

1. The Fifth Circuit decision conflicts with decisions from the First and Sixth Circuits. Were this Court to grant a writ of certiorari it should affirm the Fifth Circuit's extension of the requirements set forth in Monell to impose municipal liability for damages under 42 U.S.C.A. §1981, however, the case is not ripe.

2. Proof that the final decision maker in personnel matters was authorized to take action, is insufficient to impose municipal liability under 42 U.S.C.A. §1981 or §1983 unless the discrimination resulted from actions of a policymaker or from official "policy or custom".

3. The Fifth Circuit correctly held a teacher/coach does not have a sufficient property interest in his written contract to entitle him to procedural and substantive due process in a reassignment decision.

4. The Fifth Circuit correctly held that a reasonable person in Petitioner's circumstances would not have been compelled to resign when transferred to a new position as teacher/coach and correctly set aside the jury's finding of constructive termination.

TABLE OF CONTENTS

REPLY POINTS i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES 2

STATEMENT OF THE CASE 3

THE PROCEEDINGS BELOW 4

REPLY TO THE PETITION FOR GRANTING THE WRIT 4

CONCLUSION AND PRAYER 8

TABLE OF AUTHORITIES

Cases: Page

Brotherhood of Locomotive Firemen and Engineermen and Bangor v. A. R. Co., 389, 88 S.Ct. 437 19 L.Ed.2d 560 (1967) 7

City of St. Louis v. Praprotnik, ____ U.S. ___ 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) 6

FTC v. Flotill Products, Inc., 389 U.S.C. 179 88 S.Ct. 401, 19 L.Ed.2d 398 (1967) 7

Franchise Tax Port of California v. United States Postal Service, 467 U.S. 512, 520, 104 S.Ct. 2549, 2554, 81 L.Ed.2d 446 (1984) 5

Greenwood v. Ross, 778 F.2d 448, 456 (8th Cir. 1985) 5

Jett v. Dallas Independent School District, 798 F.2d 748 (5th Cir. 1986), affirmed on rehearing, 837 F.2d 1244 (5th Cir. 1988) 1

Leonard v. City of Frankfort Electric and Water Plant Board, 752 F.2d 189, 194 n.9 (6th Cir. 1985) 5

Loeffler v. Frank, _____ U.S. _____ 56 L.W. 4554 (Slip Op. 61388) 5

Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d (1978) i,5,6

Patterson v. McClain Credit Union, 108 S.Ct. 1419 (1988) 6

Springer v. Seamen, 821 F.2d 871 (1st Cir. 1987) 4

Taylor v. Jones, 653 F.2d 1193, 1200 (8th Cir. 1981) 5

Thorpe v. Housing Authority of the City of Durham, North Carolina, 393 U.S. 268, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969) 7

U.S. v. R.J. Reynolds Tobacco Company, 416 F.Supp. 316 (D.N.J. 1976) 7

CONSTITUTIONAL PROVISIONS

U. S. CONST. Amend. I 2

U. S. CONST. Amend. V 2

U. S. CONST. Amend. XIV §1 2

STATUTES

28 U.S.C. §1254(1) 1

42 U.S.C.A. §1981 . . . . . i,2,5

42 U.S.C.A. §1983 . . . . . i,2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NO. A-802

NORMAN JETT,
Petitioner,

V.

DALLAS INDEPENDENT SCHOOL DISTRICT,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent prays that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in Jett v. Dallas Independent School District, 798 F.2d 748 (5th Cir. 1986), affirmed on rehearing, 837 F.2d 1244 (5th Cir. 1988), be denied.

OPINIONS BELOW

The opinions below have been accurately reproduced in Petitioner's Petition for Writ of Certiorari.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides in pertinent part as follows:

> Congress shall make no law . . . abridging the Freedom of speech . . .

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1981 provides that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1983 provides in pertinent part as follows:

> Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suite in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

1. Reply to Factual Summary.

Although Respondent does not agree with Petitioner's version of the facts as they pertain to Dr. Todd, since the jury found Dr. Todd acted with racial animus in recommending Petitioner's reassignment, and since this finding was affirmed on appeal, Respondent does not address it. It further needs to be pointed out that Petitioner has since entered into a Settlement Agreement with Dr. Todd and released him from all liability.

The pertinent facts which the Respondent wishes to address pertain more to the structure of the Dallas Independent School District. The Dallas Independent School District is governed by its elected Board of Trustees who have the sole authority to issue policies. The position of superintendent is recognized under Texas statutes and the Board of Trustees employ the superintendent pursuant to a written contract. The superintendent is not authorized to establish policies pertaining to the hiring and termination of Dallas Independent School District employees. Superintendent Linus Wright in the instant case had the

authority to transfer personnel such as Mr. Jett, and although these decisions were not reviewable by the Board of Trustees, Superintendent Wright had no authority to establish policy that was binding upon the Dallas Independent School District in regard to discrimination in the work place.

In its current posture, Petitioner will seek to recover damages against the Dallas Independent School District because of the actions of Dr. Todd using respondeat superior or of Superintendent Wright, who was not sued, based on dictum in the Fifth Circuit opinion.

2. The Proceedings Below.

The Petitioner's account is substantially correct. The additional procedural factor pertains to an intervening settlement with Dr. Todd that resulted in his dismissal. The effect of this settlement is unclear. Petitioner will argue he can still recover damages against Respondent because of Dr. Todd's actions using respondeat superior. Respondent believes the settlement will render these damage claims moot.

REPLY TO THE PETITION FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT CORRECTLY EXTENDED THE "MONELL" REQUIREMENTS IN A DISCRIMINATION CASE BROUGHT UNDER 42 U.S.C.A. §1981.

The Fifth Circuit decision is particularly correct where, as here, the Petition seeks to impose municipal liability for damages as opposed to equitable relief. The Respondent concedes that the Fifth Circuit decision is in direct conflict with Springer v. Seaman, 821 F.2d 871 (1st Cir. 1987), which was a wrongful termination case under 42 U.S.C.A. §1981

brought against the postal service. Although Springer could arguable be distinguished since it is an action against the postal service which is to be treated as any other commercial venture, Id. at 881, Franchise Tax Board of California v. United States Postal Service, 467 U.S. 512, 520, 104 S.Ct. 2549, 2554, 81 L.Ed.2d 446 (1984); Loeffler v. Frank, ____ U.S. _____, 56 L.W. 4554 (Slip Op. 61388) (holding the postal service waived immunity and was to be treated like any other private commercial enterprise. Id. at 4556), nevertheless the importance of this unanswered federal question would probably not justify this Court in denying the writ because of this distinction in Springer. Springer clearly held that the rationale of Monell was not applicable to cases brought under 42 U.S.C.A. §1981 and ruled that the postal service could be liable for discriminatory actions in violation of 42 U.S.C.A. §1981 provided the postal worker was acting in the scope of his authority when they caused a racially motivated investigation to be commenced. 821 F.2d at 881. The Fifth Circuit also appears to be in conflict with the Sixth Circuit in Leonard v. City of Frankfort Electric and Water Plant Board, 752 F.2d 189, 194 n. 9 (6th Cir.1985), where the court reversed a summary judgment and disapproved of the trial court's sole reliance upon Monell in rejecting the respondeat superior doctrine in actions under 42 U.S.C.A. §1981. The Respondent does not concur that the Fifth Circuit decision is in conflict with the Eighth Circuit, since the cited cases of Greenwood v. Ross, 778 F.2d 448, 456 (8th Cir. 1985) and Taylor v. Jones, 653 F.2d 1193, 1200 (8th Cir.1981), do not appear to pass upon the issue.

The Fifth Circuit appears to be in conflict with the First and Sixth Circuits on this most important unanswered question. The Fifth Circuit has correctly decided that municipal liability for damages may not be visited upon the Dallas Independent School District in the absence of proof that the discriminatory actions were due to the actions of the official policymakers (i.e., the elected Trustees or persons to

whom they delegated policymaking authority) or were due to an official policy or custom adopted or sanctioned by the Board of Trustees. Petitioner incorrectly argues the Fifth Circuit ignored the Monell approach in reviewing both the legislative history and language of the statute to determine whether or not respondeat superior will be applicable to actions under 42 U.S.C.A. §1981. The Fifth Circuit reviewed the legislative history of 42 U.S.C.A. §1981 and concluded ". . . [W]e are aware of no specific legislative history of §1 of the 1866 act, comparable to that of the 1871 act, indicating an intent to impose municipal liability." The Fifth Circuit reviewed the language of 42 U.S.C.A. §1981 and concluded ". . . [S]ection 1 of the 1866 act contains no language which can be construed as covering municipalities, and it does not purport to create a cause of action or to assign or impose liability or responsibility on anyone."

The "contours" of municipal liability under 42 U.S.C.A. §1983 have been continually defined in the last ten years since Monell was decided. Monell was recently reaffirmed in St. Louis v. Praprotnik, _____U.S._____, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) where the court made it clear that municipal liability for a denial of civil rights (free speech) under 42 U.S.C.A. §1983 will not be visited merely because an official was authorized to take action, unless he it also the policymaker or was acting pursuant to an official policy or custom. The contours of municipal liability under 42 U.S.C.A. §1981 have yet to be articulated as clearly, indeed this Court has raised speculation about the continued viability of the use of 42 U.S.C.A. §1981 as a vehicle to recover damages based upon racial harassment in Patterson v. McClain Credit Union, 108 S.Ct. 1419 (1988).

There is a conflict among the circuits regarding a major unanswered question of federal law, i.e., whether or not the requirements of Monell will be extended to actions for damages brought under 42 U.S.C.A. §1981 against a

municipality. As a general rule, a conflict of the circuit courts requires this Court to grant certification, FTC v. Ficrill Products, Inc., 389 U.S.C. 179, 88 S.Ct. 401, 19 L.Ed.2d 398 (1967), in order to assure uniformity of federal law. U.S. v. R.J. Reynolds Tobacco Company, 416 F.Supp. 316 (D.N.J.1976). Respondent further acknowledges the need for the further definition of the "contours" of municipal liability under 42 U.S.C. §1981, however, this Court must determine whether or not these important questions are sufficiently ripe for determination because the Court will not answer hypothetical questions. Thorpe v. Housing Authority of the City of Durham, North Carolina, 393 U.S. 268, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969). The Court may not review a case which may not be sufficiently ripe as where the Court of Appeals remands for further proceedings. Brotherhood of Locomotive Firemen and Engineermen and Bangor v. A. R. Co., 389 U.S. 327, 88 S.Ct. 437, 19 L.Ed.2d 560 (1967). The damage case against Dr. Todd has been disposed of by a settlement. Since the Trial Court has yet to determine whether or not the Petitioner is entitled to recover any damages, this case may not be ripe for a review and the Petition for Writ of Certiorari should be denied. Respondent has not briefed the remaining points in the Petition as Petitioner has not briefed them.

WHEREFORE, PREMISES CONSIDERED, the Respondent prays that the Petition for Writ of Certiorari be denied and for such other and further relief, general and special, at law or in equity, to which it may show itself to be justly entitled.

Respectfully submitted,

BROWN, BROWN,
CHANDLER &TOWNEND

David W. Townend
P.O. Box 472286
Garland, Texas 75047
(214) 271-4561
Attorney For Respondent

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Respondent's Reply to Petitioner's Petition for Writ of Certiorari has been mailed to the attorneys for the Petitioner, Mr. Frank Gilstrap, Mr. Frank Hill and Mr. Shane Goetz, 1400 West Abram Street, Arlington, Texas 76013 on this 18 day of August, 1988.

David W. Townend

Supreme Court, U.S.
FILED
JAN 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2084
No. 88-214

In The

Supreme Court of the United States

October Term, 1988

NORMAN JETT,

Petitioner,

vs.

DALLAS INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

FRANK GILSTRAP *
FRANK HILL
SHANE GOETZ
Hill, Heard, Oneal
Gilstrap & Goetz
1400 West Abram Street
Arlington, Texas 76013
(817) 261-2222

Counsel for Petitioner

LEONARD J. SCHWARTZ *
DENNIS J. EICHELBAUM
BEN NIEDECKEN
Dallas Independent School
District
3700 Ross Avenue
Dallas, Texas 75204-5491
(214) 824-1620

Counsel for Respondent

*Counsel of Record

PETITION FOR CERTIORARI IN
CASE NO. 87-2084 FILED JUNE 21, 1988

CROSS-PETITION FOR CERTIORARI IN
CASE NO. 88-214 FILED JULY 21, 1988

CASES CONSOLIDATED AND CERTIORARI
GRANTED IN BOTH CASES NOVEMBER 7, 1988

TABLE OF CONTENTS

Page

Relevant Docket Entries 1
Plaintiff's First Amended Complaint 6
Defendants' First Amended Answer 23
Court's Charge to the Jury (and Jury Verdict) 29
Selected Trial Testimony of Dallas ISD Officials
- Superintendent Linus Wright 64
- Assistant Superintendent John Santillo 73
- Athletic Director John Kincaide 78

United States Constitutional Provisions
- Thirteenth Amendment 79
- Fourteenth Amendment (Sections 1 and 5) 79
- Fifteenth Amendment 79

Statutes
- United States Code
  - 18 U.S.C. § 241 80
  - 18 U.S.C. § 242 80
  - 28 U.S.C. § 1331 80
  - 28 U.S.C. § 1343 80
  - 42 U.S.C. § 1981 81
  - 42 U.S.C. § 1983 82
  - 42 U.S.C. § 1988 32
- Revised Statutes (1874)
  - Section 5506 83
  - Section 5507 83
  - Section 5508 83
- United States Statutes at Large
  - Civil Rights Act of April 9, 1870 (c. 31, 14 Stat. 27) 84
  - Civil Rights Act of May 31, 1870 (c. 114, 16 Stat. 140) 89
  - Civil Rights Act of April 20, 1871 (c. 114, 17 Stat. 13) 101

Order of Supreme Court of the United States Granting Certiorari in Case No. 87-2084 108

Order of Supreme Court of the United States Granting Certiorari in Case No. 88-214 109

TABLE OF CONTENTS - ITEMS PRINTED IN APPENDIX TO PETITION FOR WRIT OF CERTIORARI

The following opinions, decisions, judgments and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the printed Petition for Writ of Certiorari filed in Case No. 87-2084:

Memorandum Opinion and Order of the United States District Court, dated December 10, 1984 ..... App. 45A

Amended Reformed Judgment of the United States District Court, dated February 7, 1985 ..... App. 64A

Opinion of the United States Court of Appeals. dated August 27, 1986 ..... App. 1A

Judgment of the United States Court of Appeals, dated August 27, 1986 ..... App. 66A

Order of the United States District Court dismissing Defendant Frederick Todd, dated November 18, 1987 ..... App. 84A

Order of the United States Court of Appeals dismissing Defendant Frederick Todd, dated December 10, 1987 ..... App. 82A

Opinion and Order of the United States Court of Appeals on Suggestion for Rehearing En Banc, dated February 5, 1988 ..... App. 33A

Disc: U
Date: 12/29/88
File: lawTOCa
Typestyle: century
Appendix to table of contents

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1983		
May 17	1	Filed COMPLAINT. Issued Summons (12).
Jun 2	4	Filed all DEFTS' ORIGINAL ANSWER.
Sep 26	12	Filed Defts' CONSENT TO AMENDED PLEADING (pltf's amended complaint).
Nov 7	13	Filed Pltf's FIRST AMENDED COMPLAINT.
Dec 14	14	Filed DEFTS' FIRST AMENDED ANSWER.
1984		
Apr 23	24	Filed PLAINTIFF'S REQUESTED INSTRUCTIONS AND ISSUES.
Apr 25	20	Filed DEFENDENTS' PORTION OF PRETRIAL ORDER.
Oct 5	34	Filed DEFENDENTS REQUESTED GENERAL CHARGE AND SPECIAL VERDICT.
Oct 9		MIN ENTRY...Jury Sworn & Seated. ocnt. to 10/10/84.
Oct 15	42	Filed COURT'S CHARGE TO THE JURY.
Oct 15		MIN ENTRY...Jury returned with verdict... Platf's counsel to submit judg.
Oct 22	43	Filed JUDGMENT that Pltf recover of the Deft. Frederick Todd, individually, the sum of $50,000.00, with interest as provided by law and that the Pltf., recover of the Deft. Frederick Todd & Dallas Independent School District, jointly & severally, the sum of $50,000.00, with int. as provided by law, and that Pltf., recover of the deft. DISD the sum of $650,000.00, with int. as provided by law, and his costs of action, including reasonable attys. fees as determined by this Court. Dkt'd 10/24/84.
		copies mailed to counsel.

DATE	NR.	PROCEEDINGS
1983		
Nov 2	44	Filed DEFENDANT'S MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT, FOR NEW TRIAL, REMAND OR REMITTITUR.
Nov 2	45	Filed DEFENDANTS' BRIEF IN SUPPORT OF ITS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FOR NEW TRIAL, FOR REMAND, OR REMITTITUR.
Nov 28	46	Filed PLAINTIFFS RESPONSE TO DEFENDANTS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT FOR NEW TRIAL AND FOR REMAND OR REMITTITUR.
Dec 10	47	Filed MEMORANDUM OPINION AND ORDER that Defts. Motion for Judgment Notwithstanding the Verdict should be, & hereby is, GRANTED to the extent that the award of $50,000.00 in punitive damages against Deft. Todd is set aside as unsupported by the evidence, the award of $150,000 in actual damages against DEFT Todd is set aside as duplicative, & the judgment should be reformed to reflect actual damages in the amt. of $650,000 against Deft. DISD, of which Deft. Todd is jointly & severally liable for $150,000...Defts. Mot. for New Trial is GRANTED on the issue of damages, unless Pltf. files a remittitur of $200,000 awarded against deft. DISD, including $100,000 awarded jointly and severally against defts. DISD and Todd. Defts. Mot. is, in all other respects, DENIED...Defts. Motion for Remand is DENIED. Dkt'd 12/10/84. copies mailed to counsel
Dec 14	47A	Filed PLTF's REMITTITUR.

DATE	NR.	PROCEEDINGS
1983		
Dec 17	48	Filed REFORMED JUDGMENT ORDERED that Pltf recover from DISD the sum of $450,000.00 with interest of 9.5% per annum from Oct 23, 1984 until paid. Further ORDERED that Deft Frederick Todd is jointly & severally liable for $50,000.00 of said $450,000 awarded against deft DISD & that Pltf recover from Deft Frederick Todd the sum of $50,000 with interest of 9.5% per annum from Oct 23, 1984 until paid. Further ORDERED that Pltf recover from Defts DISD & Frederick Todd, jointly & severally, his costs of Court, including reasonable attys fees as determined by this Court. Dkt'd 12/18/84. Copies mailed to counsel.
Dec 28	49	Filed PLAINTIFFS MOTION WITH SUPPORTING BRIEF AND AFFIDAVITS FOR AWARD OF ATTORNEYS FEES.
1985		
Jan 2	50	Filed PLTF'S AFFIDAVIT IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES
Jan 7	51	Filed DEFENDANTS' NOTICE OF APPEAL from the Judgment entered 12-17-84 and the order entered 12-10-84 (AIS to cnsl; no fee paid)
Jan 17	54	Filed DEFENDANT'S REPLY WITH SUPPORTING BRIEF TO THE PLAINTIFF'S MOTION FOR AWARD OF ATTORNEYS' FEES.
Jan 24	57	Filed DEFENDANTS' AMENDED REPLY WITH SUPPORTING BRIEF TO THE PLAINTIFF'S MOTION FOR AWARD OF ATTORNEYS' FEES.

DATE	NR.	PROCEEDINGS
1985		
Feb 7	59	Filed AMENDED REFORMED JUDGMENT...the Reformed Judgment signed by this Court on Dec 17, 1984 is amended as set forth below: ORDERED that Pltf recover from Deft DISD the sum of $450,000.00 with interest of 9.5% per annum from Dec. 17, 1984, until paid. Further ORDERED that Deft Frederick Todd is jointly & severally Liable for $50,000 of said $450,000 awarded against DISD, therefore, Pltf Norman Jett recover from Deft Frederick Todd the sum of $50,000 with interest of 9.5% per annum from Dec. 17, 1984, until paid. Further ORDERED that Pltf recover from Defts DISD & Frederick Todd jointly & severally, his costs of court, including reasonable attys' fees through this date, in the sum of $112,870.45, with interest at the rate of 9.5% per annum from Dec. 17, 1984 until paid. Dkt'd 2-8-85 copies mailed to counsel.
Mar 1	60	Filed DEFENDANTS' SECOND NOTICE OF APPEAL from the Reformed Judgment entered December 17, 1984.
1987		
Nov 18	66	ORDER OF DISMISSAL OF DEFT. FREDERICK TODD with prejudice, as a party deft. Frederick Todd & Colony Ins. Co. Dkt'd 11/18/87 copies mailed to counsel
Dec 18	67	ORDER OF DISMISSAL OF DEFENDANT FREDERICK TODD from USCA5 dated 12-16-87: "ORDERED that defendant Frederick Todd be, and hereby is, DISMISSED, with prejudice, as a party defendant in this numbered case".

DATE	NR.	PROCEEDINGS
1988		
Feb 8	68	JUDGMENT issued as Mandate February 5, 1988 from USCA5, "ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court. IT IS FURTHER ORDERED that costs on appeal be taxed one-third against appellant Todd and two-thirds against appellee Jett, said costs to be taxed by the Clerk of this Court".
	69	OPINION from USCA5...REVERSED AND REMANDED.
	73	OPINION ON SUGGESTION FOR REHEARING EN BANC from USCA 5 cy Judge Sanders.
Nov 11		Received telephone call from Susan Vaughn, Case Manager, USCA5, to forward 10 Vols. original record to Fifth Circuit.
Nov 14		Transmitted Original record on appeal to USCA5: case papers - 6 Volumes - including 3 Vols. labeled "A", "D", and "E"; transcripts - 4 Volumes labeled "F"

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

NORMAN JETT, Plaintiff VS. DALLAS INDEPENDENT SCHOOL DISTRICT; FREDERICK TODD, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS PRINICPAL FOR SOUTH OAK CLIFF HIGH SCHOOL OF THE DALLAS INDEPENDENT SCHOOL DISTRICT; THE BOARD OF TRUSTEES OF THE DALLAS INDEPENDENT SCHOOL DISTRICT; AND LEONARD CLEGG, KATHRYN GILLIAM, ROBERT MEDRANO, ROBERT HESTER, RICHARD CURRY, HOWARD DRIGGERS, DUANE JARVIS, JOHN MARTIN, AND MARY RUTLEDGE, ALL IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE BOARD OF TRUSTEES OF THE DALLAS INDEPENDENT SCHOOL DISTRICT Defendants	)	CIVIL ACTION NO. CA 3-83-0824-H

FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes NORMAN JETT, hereinafter called "Plaintiff," by and through his undersigned attorneys, and files this, his First Amended Complaint with the written consent of

counsel for Defendants in accordance with Rule 15(a) of the Federal Rules of Civil Procedure, said consent being attached hereto as Exhibit "A," and, for cause of action, would respectfully show the Court as follows:

I.

This is an action for legal and equitable relief in the form of damages, back wages, costs, and attorneys' fees. Jurisdiction is invoked pursuant to 42 U.S.C. §1981; pursuant to 42 U.S.C. §1983; pursuant to 28 U.S.C. §1331; and 28 U.S.C. §1343(3) and (4); and pursuant to the Constitution of the United States, particularly the First, Fifth and Fourteenth Amendments thereto. The Court's pendent jurisdiction is also invoked to consider Texas State causes of action. The amount in controversy in this cause is in excess of $20,000.00.

II.

A. Plaintiff is an adult citizen of the United States and presently resides in the Northern District of Texas.

B. The Defendant DALLAS INDEPENDENT SCHOOL DISTRICT is an independent school district organized pursuant to the laws of the State of Texas for the purpose of operating a system of public schools and is before the Court by way of previously filed pleadings.

C. Defendant FREDERICK TODD is sued herein, both individually and in his official capacity as Principal for South Oak Cliff High School of the DALLAS INDEPENDENT SCHOOL DISTRICT, and is before the Court by way of previously filed pleadings.

D. Defendant BOARD OF TRUSTEES of the DALLAS INDEPENDENT SCHOOL DISTRICT, by virtue of the statutes of the State of Texas, is given and charged with the responsibility for the possession, care, control, and management of the affairs of Defendant DALLAS INDEPENDENT SCHOOL DISTRICT and is before the Court by way of previously filed pleadings.

E. Defendants LEONARD CLEGG, KATHRYN GILLIAM, ROBERT MEDRANO, ROBERT HESTER, RICHARD CURRY, HOWARD DRIGGERS, DUANE JARVIS, JOHN MARTIN, AND MARY RUTLEDGE are all sued herein in their official capacities as duly elected, qualified, and acting members of Defendant BOARD OF

TRUSTEES AND are before the Court by way of previously filed pleadings.

III.

A. Plaintiff is a public school teacher, coach, and athletic director, by profession, who is qualified and certified to serve in such capacities in the public schools in the State of Texas.

B. Plaintiff had been employed by Defendants as a teacher and coach at South Oak Cliff High School in the DALLAS INDEPENDENT SCHOOL DISTRICT since 1962, and in 1970 was promoted to head football coach and athletic director at South Oak Cliff High School.

C. On or about March 19, 1979, Plaintiff's contract to serve as a teacher, coach, and athletic director for South Oak Cliff High School was renewed by Defendants for a term of five (5) consecutive scholastic years, beginning with the 1979-1980 school year and continuing thereafter. A true and correct copy of the written portion of that contract is attached hereto, marked Exhibit "B," and made a part hereof for all purposes, the same as if copied herein verbatim.

D. Plaintiff would show that, at the time of the execution of said contract and as additional consideration therefor, it was agreed and understood by and between the parties thereto that Plaintiff would continue to serve and perform his duties as head football coach and athletic director of South Oak Cliff High School throughout the five (5) year term of said contract.

E. Alternatively, should same be necessary, Plaintiff would show that the foregoing facts gave Plaintiff an objective expectancy of his renewal and continued employment as head football coach and athletic director of South Oak Cliff High School for the five (5) year term of said contract.

IV.

A. Plaintiff would show that, throughout his employment with Defendants, Plaintiff has fully performed all duties required under the terms and conditions of said contract and agreement, and, in fact, Plaintiff would show that he has exceeded the normal duties of a teacher/coach/athletic director and has continuously devoted his time and effort to ensure the academic and athletic success of his students.

B. Plaintiff would show that in 1972, Defendant FREDERICK TODD became Principal of South Oak Cliff High School. Plaintiff would further show, that since the time that said Defendant was appointed Principal of South Oak Cliff High School, said Defendant has continuously and systematically conducted a series of activities designed to harrass and undermine Plaintiff's efficiency and authority in the performance of his duties, and that such activities were conducted by said Defendant with intent to discriminate against Plaintiff on the basis of race.

C. Plaintiff would further show that on or about March 16, 1983, Defendant FREDERICK TODD called Plaintiff into his office and informed him that he had decided to "terminate" Plaintiff from his coaching and athletic director duties at South Oak Cliff High School.

D. Plaintiff would show that thereafter, on or about March 17, 1983, Defendant FREDERICK TODD set forth the purported reasons for his "recommendation" to relieve Plaintiff as athletic director and coach in a letter to Mr. John Kincaid of the Defendant DALLAS INDEPENDENT SCHOOL DISTRICT. Such "reasons" constituted nothing more than a sham, designed to conceal said Defendant's actual racial discrimination. In fact, there was no "good cause" for Plaintiff's termination, demotion, and/or transfer.

E. Plaintiff would show that a further substantial motivation for Defendant FREDERICK TODD's decision to "terminate" and/or "recommend" that Plaintiff be terminated as athletic director and coach of South Oak Cliff High School was Plaintiff's exercise of his protected First Amendment rights of free speech and academic freedom including, but not limited to, Plaintiff's right to speak to members of the news media about events involving athletic teams from South Oak Cliff High School.

F. At the time of the above-described actions, Defendant FREDERICK TODD was acting individually and/or

within the course and scope of his employment as a Principal for the Defendant DALLAS INDEPENDENT SCHOOL DISTRICT.

G. Further, Plaintiff would show that the action of Defendant FREDERICK TODD in firing Plaintiff was ratified and approved by the Defendant DALLAS INDEPENDENT SCHOOL DISTRICT and the BOARD OF TRUSTEES in that the removal of Plaintiff was approved by said Defendants (through those to whom such decisions had been delegated) and Plaintiff was thereafter reassigned with the approval of the Defendants despite his objections to such removal and reassignment.

H. Plaintiff would further show that he was never given written notice of his purported "non-renewal," as head coach/athletic director, by the Defendant BOARD OF TRUSTEES.

V.

A. Immediately upon learning that Defendant FREDERICK TODD had "terminated" him, Plaintiff met with Linus Wright and other duly-authorized officials of the DALLAS INDEPENDENT SCHOOL DISTRICT, who had been delegated with the authority to make decisions on terminations, transfers, and demotions by the BOARD OF TRUSTEES, to protest Defendant TODD's "termination" of Plaintiff as head coach/athletic director. At such meetings, Plaintiff explained the course of harrassment and discrimination conducted by Defendant TODD.

B. Plaintiff was thereafter transferred to a teaching position in a different school, without his athletic director/coaching duties. Subsequently, by letter dated May 5, 1983, Defendants informed Plaintiff that he was being reassigned to a security position within the DALLAS INDEPENDENT SCHOOL DISTRICT, that he was being placed on an unassigned personnel budget and that he could not anticipate any expectation of continued employment in the security department beyond the 1982-1983 school year.

C. Subsequently, Plaintiff was notified that he was being transferred to Thomas Jefferson High School for the

1983-1984 school year without his athletic director duties and that he was being assigned as a social studies teacher/freshman football coach, and junior varsity track coach.

D. Plaintiff would show that, in part, as a result of his exercise of his protected First Amendment right of free speech in protesting and challenging Defendant TODD's wrongful "termination" of Plaintiff as head coach/athletic director, Defendants ratified said "termination," demotion, and transfer, subsequently reassigned Plaintiff three (3) times, and otherwise deliberately made Plaintiff's working conditions so intolerable that Plaintiff was forced to resign by letter dated August 19, 1983, a copy of which is attached hereto as Exhibit "C," and made a part hereof for all purposes. At that point, the working conditions surrounding Mr. Jett's employment were so difficult that a reasonable person in his place would have felt compelled to resign, as he did.

E. Therefore, only after and as a result of Defendants' above-described wrongful, arbitrary, and capricious conduct, which constituted a part of a continuing course of harrassment by Defendants of Plaintiff, Plaintiff "resigned" his employment with Defendant DALLAS INDEPENDENT SCHOOL DISTRICT.

VI.

Plaintiff would show that the above-described conduct of Defendant FREDERICK TODD against Plaintiff, which conduct was ratified and approved by the other Defendants herein, as set forth above, was racially motivated. Plaintiff has a constitutionally protected liberty interest in being free from such racially-motivated conduct and discrimination by the Defendants herein. Accordingly, Defendants have, as a matter of law, deprived Plaintiff of said liberty interest without procedural or substantive due process of law, in contravention of the Constitution of the United States.

VII.

Plaintiff further alleges that Defendants' above-described wrongful conduct is violative of Plaintiff's Fourteenth Amendment right of equal protection in that Defendants have imposed arbitrary and capricious measures on Plaintiff, but not on others similarly situated, without a rational basis or compelling reason for such discrimination.

VIII.

A. Plaintiff would further show that Defendants' above-described conduct wrongfully deprived Plaintiff of his constitutionally protected liberty interests in free speech and academic freedom, and otherwise infringed upon said rights, all without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

B. Plaintiff further alleges that Defendants' above-described conduct and action was taken in retaliation against Plaintiff for his exercise of protected rights of free speech, academic freedom, and free association, in violation of the First Amendment to the Constitution of the United States.

IX.

A. Plaintiff would further show that as a direct and proximate result of the Defendants' above and foregoing conduct, Plaintiff has been unconstitutionally deprived of his property interest in continued employment as an athletic director and football coach, without procedural due process of the law and without substantive due process of the law, in violation of the Fifth and Fourteenth Amendments to the United State Constitution.

B. Plaintiff would further show that Defendants' above-described wrongful conduct was arbitrary and capricious and, therefore, a violation of Plaintiff's right of procedural and substantive due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

X.

Plaintiff would further show that Defendants constructively terminated his employment by imposing upon him the aforementioned continuing course of harrassment. If not for such wrongful conduct by Defendants, Plaintiff would still be active in his chosen profession of teaching and would still be employed within the Defendant DALLAS INDEPENDENT SCHOOL DISTRICT. Such constructive termination deprived Plaintiff of his property interest in continued employment and has substantially foreclosed his opportunity to pursue employment opportunities within the DALLAS INDEPENDENT SCHOOL DISTRICT, thereby depriving him of his property and liberty interests in same, all without due process of law.

XI.

Plaintiff would further show that all of the aforementioned conduct of Defendants was taken under the color of law.

XII.

Plaintiff would further show that Defendants' above-described conduct was in direct contravention of Defendants' own written policies, thereby depriving Plaintiff of his property and/or liberty interest in such policies, without due process of law.

XIII.

A. Additionally, Plaintiff would show that Defendants' actions constitute a breach of contract under the laws of the State of Texas for the reason that Plaintiff entered into a contract with Defendants which was partially written and partially oral and, under Texas state law, the removal of Plaintiff from his position of coach and athletic director without good cause during the term of said contract amounts to a breach of said contract. In this connection, Plaintiff says that said breach of contract arises from the same nucleus of operative facts that forms Plaintiff's con-

stitutional claims herein or, in the alternative, is such an integral part thereof so as to attach this Court's pendent jurisdiction.

B. Plaintiff would show that, in addition to his removal from his duties as an athletic director and coach, Plaintiff's "reassignment" from his position as athletic director and coach of South Oak Cliff High School to a job in the security department of the DALLAS INDEPENDENT SCHOOL DISTRICT and then to a position as freshman football coach and junior varsity track coach at Thomas Jefferson High School constitutes a material change in his position of employment and/or a demotion, both of which constitute a deprivation of a protected property and/or a liberty interest and a breach of contract under Texas state law.

C. Pleading in the alternative, should same be necessary, Plaintiff says further that his contract of employment was a "term contract" within the meaning of Section 21.201, Texas Education Code. Plaintiff says that, if Defendant TODD's actions against your Plaintiff comprised nothing more than a "recommendation" of non-renewal, then, in that event, the Defendant BOARD OF TRUSTEES OF THE DALLAS INDEPENDENT SCHOOL DISTRICT wholly failed to give written notice of any purported "non-renewal" to your Plaintiff on or before April 1, 1983. Accordingly, pursuant to Section 21.204(b) Texas Education Code, Plaintiff had been re-employed, both as teacher and as athletic director/coach for the next succeeding school year. Specifically, said provision of the Texas Education Code reads as follows:

> In the event of failure to give such notice of proposed non-renewal within the time herein specified, the Board of Trustees shall thereby elect to employ such employee in the same professional capacity for the succeeding school year.

Plaintiff respectfully says that Defendant's action in purporting to terminate and/or to non-renew him as athletic director/coach during the term of his contract and in the manner described herein also constitutes a breach of contract under the laws of the State of Texas and works an unconstitutional deprivation of that additional property interest without due process of law, all in violation of the Fourteenth Amendment to the Constitution of the United States.

XIV.

A. As a direct and proximate result of Defendants' actions, Plaintiff has suffered damages in that he has suffered lost wages and a diminished earning capacity, and damage to his personal and professional reputation, in a sum in excess of $50,000.00, for which Plaintiff here sues.

B. As a further, direct, and proximate result of Defendants' wrongful deprivation of Plaintiff's rights, Plaintiff has been caused to suffer great mental anguish and/or distress, and in all probability, will continue to suffer such mental anguish and/or distress for an indefinite time in the future, all to Plaintiff's damage in a sum in excess of $50,000.00, for which Plaintiff here sues.

C. Plaintiff also here sues to recover his reasonable and necessary attorneys' fees, both by virtue of the foregoing facts and by virtue of the "Civil Rights Attorneys Fee Award Act of 1976," 42 U.S.C. §1988, as well as under pertinent Texas statutes.

XV.

A. Plaintiff would show that Defendant FREDERICK TODD, in the above-described wrongful conduct, has acted in bad faith, vexatiously, wantonly, maliciously, and for oppressive reasons, and that said Defendant has acted with the malicious intention to cause Plaintiff a deprivation of his constitutional rights, as alleged above, or with a reckless disregard for Plaintiff's rights.

B. Plaintiff would further show that Defendant FREDERICK TODD knew or should have known that his above-described wrongful conduct would violate Plaintiff's rights, as alleged above. Accordingly, Defendant is liable to Plaintiff, both in his individual and official capacities. Additonally, for the foregoing reasons, Plaintiff is entitled to

recover exemplary damages from Defendant FREDERICK TODD in a sum in excess of $50,000.00, for which Plaintiff here sues.

XVI.

Plaintiff would further show that his reasonable and necessary attorney's fees incurred in connection with this cause will be in the sum of $100,000.00; that the sum of $25,000.00 should be credited should this cause not be appealed to the Fifth Circuit Court of Appeals from one trial hereof; and that additional attorneys' fees in the sume of $25,000.00 should be credited should proceedings not be had before the United States Supreme Court in connection with this cause. Accordingly, Plaintiff says that such attorneys' fees are and will be reasonable and necessary, and Plaintiff here sues to recover same against all Defendants in their respective capacities.

XVII.

Plaintiff respectfully demands trial by Jury.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully prays that he have judgment of and against Defendants, both jointly and severally, in their respective capacities for his damages, including his lost wages and diminished earning capacity; for his mental anguish and/or distress; for damage to his professional and personal reputation; for his reasonable and necessary attorneys' fees; and further that Plaintiff have judgment against Defendant FREDERICK TODD individually for Plaintiff's exemplary damages; for costs of court; and for such other and further relief, both general and special, at law and in equity, to which Plaintiff may show himself justly entitled.

Respectfully submitted,

HILL, HEARD, ONEAL,
GILSTRAP & GOETZ
1400 West Abram Street
Arlington, Texas 76013
(817) 261-2222

By: /s/ Frank Hill
FRANK HILL
State Bar No. 09632000

By: /s/ Shane Goetz
SHANE GOETZ
State Bar No. 08059400

By: /s/ Michael A. Rossetti
MICHAEL A. ROSSETTI
State Bar No. 17309200
ATTORNEYS FOR PLAINTIFF

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NORMAN JETT	)	
	)	
VS.	)	CA 3-83-0824-H
	)	
DALLAS INDEPENDENT SCHOOL DISTRICT, ET AL.	)	

CONSENT TO AMENDED PLEADING

I, J. Carlisle DeHay, Jr., attorney of record for Defendants in the above-referenced cause, consent to NORMAN JETT amending his Complaint against Defendants as provided by Rule 15(a) of the Federal Rules of Civil Procedure.

DeHAY & BLANCHARD
2300 South Tower
Plaza of the Americas
Dallas, Texas 75201-2880
(214) 651-7000

By: /s/ J. Carlisle DeHay, Jr.
J. CARLISLE DeHAY, JR.
State Bar No. 05644000
ATTORNEYS FOR DEFENDANTS

Exhibit "A"

STATE OF TEXAS COUNTY OF DALLAS

Date: 03/14/79

DALLLAS INDEPENDENT SCHOOL DISTRICT
School Administration Building 3807 Ross Avenue
Dallas, Texas 75204

NORMAN R. JETT
456-44-5684

TEACHER CONTRACT
(Five-Year)

1. The Dallas Independent School District, hereafter called District, acting through the General Superintendent of Schools, hereby agrees to employ the undersigned teacher and the undersigned teacher hereby agrees to be employed by the District as a teacher subject to assignment commencing on the 1st day of Scholastic Yr, 1979 for the term of five (5) consecutive scholastic years thereafter subject to all the terms and provisions enumerated both below and in the District's Personnel Guide now in force and hereafter promulgated.
2. The District agrees to pay to the teacher for all the services rendered under this contract a salary at the annual rate as fixed by the Schedule of Teachers salaries as adopted by the Board of Education, which annual salary will be paid in twelve monthly installments.
3. The General Superintendent shall have the right to assign the teacher to such school as he may determine, and may from time to time assign or reassign the teacher to other schools. The teacher agrees to perform his/her duties as a teacher and at all times to carry out the orders and procedures of the Principal of the school to which he/she is assigned in conformity with the Board Policies and Administrative Policies and Procedures. If the teacher shall fail, refuse or be unable to perform his/her obligations here undertaken, this contract may be terminated by the District in accordance with the

Exhibit "B"

rules and procedures of the Board of Education now in force or hereafter promulgated.

4. On or before April 1 of each scholastic year of this contract, the teacher shall be subject to a performance evaluation by the District. Such performance evaluation shall be conducted pursuant to the rules and procedures of the District now in force or hereafter promulgated.
5. All contracts of employment shall be subject to any necessary reduction of school personnel. This contract may be terminated by the District in the event that any necessary reduction of school personnel may be required.
6. This contract is subject to available funds and subsequent salary schedules and such other adjustments in duration and rate of compensation as determined by the Board of Education to be necessary for the District to operate within the budget therefor.
7. This contract of employment is a binding contract and may not be terminated by the teacher without written District approval. The teacher may make written request to the Assistant Superintendent—Personnel for termination of this contract, however, this contract may not be terminated unless agreed to in writing by the Assistant Superintendent—Personnel. On or before July 1 preceding an ensuing scholastic year, the District will consider any request by the teacher for termination based on reasonable circumstances. However, after July 1, preceding an ensuing scholastic year and during said scholastic year, the District will only consider requests by the teacher for termination based on exceptional and unusual circumstances. If the Assistant Superintendent—Personnel does not agree in writing to terminate this contract, any resignation or other termination of this contract by the teacher will result in the District's recommendation to the State Commissioner of Education that the teacher's certificate be suspended and that the teacher be prohibited from employment by any

other school district in the State of Texas for one complete scholastic year.

Signed this 14th day of MARCH, 1979

DALLAS INDEPENDENT SCHOOL DISTRICT

/s/ Linus Wright
General Superintendent

/s/ Norman Jett
Teacher

Norman Jett
Rt. 6, Box 456
Kemp, Tx. 75143
S-19-83

Linus Wright
Superintendent of Schools
Dallas Independent Schools District

Dear Mr. Wright,

After considering my assignment as Social Studies Teacher/freshman football coach, and Junior Varsity track coach at the Thomas Jefferson High School, without the principal or Head Coach-Atheletic Director's knowledge, I have decided that accepting the position would cause too much friction in my life and the Thomas Jefferson situation. I have therefore made decision. I feel forced to resign from the public education field with much sorrow and humiliation. Please accept my resignation.

Sincerely,
/s/Norman Jett

Exhibit "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NORMAN JETT	)	
	)	
VS.	)	CIVIL ACTION NO.
	)	CA3-83-0824-H
DALLAS INDEPENDENT	)	
SCHOOL DISTRICT, ET AL	)	

DEFENDANTS' FIRST AMENDED ANSWER

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Come Now the Defendants, DALLAS INDEPENDENT SCHOOL DISTRICT; FREDERICK TODD, Individually and in his official capacity as Principal for South Oak Cliff High School of the Dallas Independent School District; THE BOARD OF TRUSTEES OF THE DALLAS INDEPENDENT SCHOOL DISTRICT; and LEONARD CLEGG, KATHLYN GILLIAM, ROBERT MEDRANO, ROBERT HESTER, RICHARD CURRY, HOWARD DRIGGERS, DUANE JARVIS, JOHN MARTIN and MARY RUTHLEDGE, all in their official capacities as members of the Board of Trustees of the Dallas Independent School District, and subject to their Motion to Dismiss herein file this their First Amended Answer to the Plaintiff's First Amended Complaint, respectfully showing to the Court the following:

I.

Defendants admit Plaintiff makes the jurisdictional allegations but denies them.

II.

A. Defendants admit the allegations in Paragraph IIA.
B. Defendants admit the allegations in Paragraph IIB.

C. Defendants admit the Plaintiff has sued the Defendant, Frederick Todd, in his individual and official capacity.

D. Defendants admit the allegations in Paragraph IID.

E. Defandants admit that the Plaintiff has sued the members of the School Board in their official capacities.

III.

A. Defendants admit that Plaintiff was a teacher and coach, and was certified to teach but deny that Plaintiff had a special certificate or contract as a coach.

B. Defendants admit that Plaintiff had been employed under a written contract as a teacher, and has also served as a coach and athletic director at South Oak Cliff High School for the period stated, but deny that Plaintiff had a continuing contract to serve as head football coach and athletic director at South Oak Cliff High School.

C. Defendants admit that the document attached as Exhibit "D" to the First Amended Complaint is a true copy of Plaintiff's five year written contract to serve as a teacher beginning with the 1979-80 school year, but deny that Plaintiff had a contract to serve as a coach and athletic director for a five year term as is alleged in Paragraph IIIC.

D. Defendants admit that the five year contract was a teaching contract, but Defendants deny that Plaintiff had a five year contract to serve as head football coach and athletic director as alleged in Paragraph IIID.

E. Defendants deny the allegations in Paragraph IIIE.

IV.

A. Defendants deny the allegations in Paragraph IVA.

B. Defendants deny the allegations in Paragraph IVB.

C. Defendants do not deny a meeting on or about such date in which the Defendant Todd indicated he was going to recommend the Plaintiff's reassignment, but the Defendants' deny the remaining allegations in Paragraph IVC.

D. Defendants admit the allegations in the first sentence of Paragraph IVD but deny the remaining allegations in Paragraph IVD.

E. Defendants deny the allegations in Paragraph IVE.

F. Defendants admit that Defendant Frederick Todd was acting in the course and scope of employment, but deny the allegations of the Plaintiff attributed to the Defendant todd.

G. Defendants deny the allegations in Paragraph IVG.

H. Defendants admit that Plaintiff was not furnished a written notice of nonrenewal by the Board of Trustees, but deny that the Plaintiff was entitled to such written notice as is alleged in Paragraph IVH.

V.

A. Defendants admit that the Plaintiff met with Mr. Wright and other officials of the DISD, but Defendants deny the remaining allegations in the first sentence of Paragraph VA. The Defendants deny that the Plaintiff complained of racial discrimination in such meetings, but otherwise admit the second sentence of Paragraph VA.

B. Defendants admit the allegations in Paragraph VB.

C. Defendants admit the allegations in Paragraph VC.

D. Defendants admit that the Plaintiff resigned by letter dated August 19, 1983, a true copy of which is attached as Exhibit "C" in Plaintiff's First Amended Complaint, but otherwise deny the allegations in Paragraph VD.

E. Defendants deny the allegations in Paragraph VE.

VI.

Defendants deny the allegations in Paragraph VI.

VII.

Defendants deny the allegations in Paragraph VII.

VIII.

A. Defendants deny the allegations in Paragraph VIIIA.

B. Defendants deny the allegations in Paragraph VIIIB.

IX.

A. Defendants deny the allegations in Paragraph IXA.

B. Defendants deny the allegations in Paragraph IXB.

X.

Defendants deny the allegations in Paragraph X.

XI.

Defendants deny the allegations in Paragraph XI.

XII.

Defendants deny the allegations in Paragraph XII.

XIII.

A. Defendants deny the allegations in Paragraph XIIIA.

B. Defendants deny the allegations in Paragraph XIIIB.

C. Defendants deny the allegations in Paragraph XIIIC.

XIV.

A. Defendants deny the allegations in Paragraph XIVA.

B. Defendants deny the allegations in Paragraph XIVB.

C. Defendants deny the allegations in Paragraph XIVC.

XV.

A. Defendants deny the allegations in Paragraph XVA.

B. Defendants deny the allegations in Paragraph XVB.

XVI.

Defendants deny the allegations in Paragraph XVI.

XVII.

Defendants join in the request for a jury trial.

XVIII.

Defendants deny that Plaintiff is entitled to recover as set forth in the prayer of Plaintiff's First Amended Complaint.

XIX.

Further answering, Defendants allege that Plaintiff had a five year teaching contract signed on or about March 19, 1979 to commence on the first scholastic year in 1979 and this contact was not terminated by the Defendants, but by his resignation letter of August 19, 1983 (Exhibit "C" to the Plaintiff's First Amended Complaint), the Plaintiff voluntarily resigned and waived any rights under this contract and thereby terminated the contract. Defendants deny that Plaintiff had a special contract to be coach/athletic director.

XX.

Further answering, Defendants specially deny that Plaintiff has had any alteration in his "liberty" status as a school district employee, or that he has had any alteration in any "property" interest which would require due notice and hearing, and would show that there is no continued expectation of employment as a coach and/or athletic director as his contract is for a teaching position which was in effect until his resignation and waiver.

XXI.

Further answering, Defendants specially deny that Plaintiff's reassignment was racially motivated or motivated by an intent to retaliate for an exercise of protected First Amendment rights.

XXII.

Further answering, Defendants invoke the qualified immunity defense and contend that any actions taken were taken and performed in good faith.

XXIII.

Further answering, Defendants plead the applicable statute of fraud.

XXIV.

Defendants allege that any damages, if any, sustained by Plaintiff were proximately caused by his own actions and conduct.

XXV.

Further answering, Defendants allege that in approximately late March of 1983 the Plaintiff was reassigned by the Defendant, Linus Wright, to the business magnet school and the Plaintiff accepted that assignment, however, after numerous absences, the Plaintiff agreed to accept a reassignment in a security position for the balance of the Spring Semester, 1983. In August of 1983 the Plaintiff was re-
assigned to Thomas Jefferson High School for the remaining one year on his contract, however, by letter dated August 19, 1983 the Plaintiff tendered his resignation from employment with the Dallas Independent School District, which amounts to a voluntary waiver and has rendered the issues in controversy moot.

WHEREFORE, PREMISES CONSIDERED, the Defendants pray that the Plaintiff take nothing, and that the Defendants recover their court costs and for such other and further relief, general and special, at law or in equity, to which they may show themselves justly entitled.

Respectfully submitted,

J. Carlisle DeHay, Jr.
/s/ J. CARLISLE DeHAY, JR.
David W. Townend
Plaza of the Americas
2300 South Tower
Dallas, Texas 75201
214-651-7000

ATTORNEY FOR DEFENDANTS

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NORMAN JETT Plaintiff v. DALLAS INDEPENDENT SCHOOL DISTRICT, et al Defendants	)	Civil Action No. 3-83-0824-H

COURT'S CHARGE TO THE JURY
(Prior to Argument)

MEMBERS OF THE JURY:

Now that you have heard the evidence, it is my duty to instruct you as to the law that is applicable to this case. At this time I will instruct you regarding the law that you should apply in answering certain questions of fact in the case, and I will ready to you those questions.

Then counsel will have the opportunity to make their closing arguments. You are instructed that the statements and arguments of counsel are not evidence. They are only intended to assist the jury in understanding the evidence and the contentions of the parties to this suit.

After the closing arguments, I will give you some additional instructions, after which you will retire to commence your deliberations.

Plaintiff's Contentions

Plaintiff Norman Jett contends that he was terminated from his employment as head coach and athletic director at

South Oak Cliff High School by Defendant Dallas Independent School District upon the recommendation of Defendant Frederick Todd in March 1983 without good cause and without notice and a hearing, in violation of his constitutional rights to due process. He also contends that the decision to terminate him was made, in part, on the basis of his race, statements he made to the press and because of the exercise of his academic freedom in the choice of a "game plan", all in violation of his constitutional rights. He further contends that he was constructively discharged from employment with the Dallas Independent School District in August 1983.

Plaintiff is seeking the recovery of damages for the violation of his constitutional rights, mental anguish, lost earnings and damage to reputation.

Defendants' Contentions

Defendants contend that Plaintiff was employed as a teacher subject to assignment and had not property interest in his position as head coach and athletic director, and thus was not entitled to constitutional protections upon his reassignment. Defendants also contend that their decisions were not based on Plaintiff's race, free speech or exercise of academic freedom, and were made in consultation with and concern for Plaintiff. Finally, Defendants contend that Plaintiff voluntarily resigned from his employment with the Dallas Independent School District in August 1983.

Instructions

Unless I instruct you otherwise, the Plaintiff has the burden of proof by the preponderance of the evidence on every element of the case. "Preponderance of the evidence" means the greater weight and degree of credible evidence. Preponderance of the evidence does not require proof to an absolute certainty, because such a degree of proof is seldom possible. It is evidence which satisfies the conscience and brings conviction to an intelligent mind.

A public independent school district (such as and including the Dallas Independent School District), acts by and through its Board of Trustees and/or its delegated administrative officials (including the Superintendent and school principals), with regard to action taken against or concerning school district personnel.

A public independent school district (such as and including the Dallas Independent School District) is liable for the actions of its Board of Trustees and/or its delegated administrative officials (including the Superintendent and school principals), with regard to wrongful or unconstitutional action taken against or concerning school district personnel.

Procedural Due Process

Under a federal statute, 42 U.S.C. § 1983, any citizen may bring suit for monetary damages against any other person or entity who, under color of state law, deprives such a citizen of any constitutional rights. Among these rights is the right not to be deprived of one's liberty or property without due process of law.

To find that Defendants deprived Plaintiff of his constitutional right to due process, you must find that from a preponderance of the evidence Plaintiff possessed what the law recognizes as a "property interest" in his position as head coach and athletic director at South Oak Cliff High School.

A property interest may arise from a contract between the parties on the subject. Such a contract may be based on mutually explicit understandings between the parties, written or oral, that Plaintiff would continue to be employed as head coach and athletic director for a specified period of time. The mere unilateral expectation on Plaintiff's part of continued employment as head coach and athletic director is insufficient to establish a property interest.

A property interest may also arise from explicit internal procedures that provide that an employee will not be removed from a given position except "for cause".

If you find by a preponderance of the evidence that Plaintiff had a property interest in his employment as head coach and athletic director, you must determine whether Defendants deprived him of that property interest without due process of law.

A transfer to a position in which the employee receives less pay or has less responsibility than in the previous assignment or which requires a lesser degree of skill can constitute a deprivation of a property interest. You are instructed that due process of law requires, in the case of the deprivation of a property interest in employment, that the employee receive written notice of the cause or causes for his removal in sufficient detail to fairly enable him to show any error and an effective opportunity to rebut those reasons. Effective rebuttal means that the employee is given the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision.

A constitutional right to due process procedures can be waived by the person entitled to them. A waiver occurs when there is a voluntary and intentional giving up of a known right.

QUESTION NO. 1

Do you find, by a preponderance of the evidence, that Plaintiff Norman Jett possessed a property interest in his employment as head coach and athletic director at South Oak Cliff High School?

Check only one answer:

"Did possess a property interest" ✔

"Did not possess a property interest" _____

If you answered this question "Did possess a property interest", go to Question No. 2. If you answered "Did not possess a property interest", go to Page 10.

QUESTION NO. 2

Do you find by a preponderance of the evidence that Plaintiff waived his right to due process procedures?

Check only one answer:

"Did waive his right"_____

"Did not waive his right"__✔__

If you answered this question "Did waive his right", go to Page 10. If you answered this question "Did not waive his right", go to Question No. 3.

QUESTION NO. 3

Do you find by a preponderance of the evidence that Defendant Dallas Independent School District ("DISD") deprived Plaintiff of his property interest in employment as head coach and athletic director without due process of law?

Check only one answer:

"Did deprive Plaintiff"__✔__

"Did not deprive Plaintiff"_____

Go on to Page 10.

Equal Protection

Defendant Dallas Independent School District ("DISD"), as a branch of the state, is prohibited by the equal protection clause of the Fourteenth Amendment of the United States Constitution from discriminating among employees wholly or partially on the basis of his race, unless such discrimination substantially furthers a compelling interest of the District. This prohibition extends to actions taken by agents and employees of DISD motivated by consideration of race.

QUESTION NO. 4

Do you find, by a preponderance of the evidence, that Defendant Todd's recommendation that Plaintiff be removed as head coach and athletic director was based in whole or in part on Plaintiff's race?

Check only one answer:

"Todd's recommendation was based in whole or in part on Plaintiff's race" ✓

"Todd's recommendation was not based in whole or in part on Plaintiff's race" _____

If you answered this question "Was based", go to Question No. 5. If you answered "Was not based", go to Page 16.

QUESTION NO. 5

Do you find from a preponderance of the evidence that Defendant Todd's recommendation to remove Plaintiff from the position as head coach and athletic director would have been made, for some other valid reason, even in the absence of any consideration of Plaintiff's race?

On this issue Defendants have the burden of proof.

Check only one answer:

"Would have been made"_____

"Would not have been made" ✔

If you answered this question "Would have been made", go to Page 16. If you answered "Would not have been made", go to Page 13.

Liability of Defendant DISD for Violation of Consititutional Rights Based on Race Discrimination

If you find that Defendant Todd's recommendation was based upon consideration of Plaintiff's race, and would not have been made in the absence of the consideration of Plaintiff's race, Defendant DISD may be liable for violating Plaintiff's constitutional rights if the decision to remove Plaintiff was made solely on the basis of Defendant Todd's recommendation without any independent investigation.

QUESTION NO. 6

Do you find, from a preponderance of the evidence, that Defendant DISD's action in removing Plaintiff as head coach and athletic director was based solely on Defendant Todd's recommendation without any independent investigation?

Check only one answer:

"Was based solely on Defendant Todd's recommendation" ✔

"Was not based solely on Defendant Todd's recommendation" _____

If you answered this question "Was based solely", go to Question No. 7. If you answered "Was not based solely", go to Page 16.

QUESTION NO. 7

Do you find from a preponderance of the evidence that Defendant DISD's action in removing Plaintiff from the position as head coach and athletic director would have been taken, for some other valid reason, even in the absence of any consideration of Plaintiff's race?

On this issue Defendants have the burden of proof.

Check only one answer:

"Would have been taken" _____

"Would not have been taken" ✔

Go to Page 16.

Free Speech

The First Amendment to the United States Constitution protects citizens from any adverse action being taken against them on the basis of the exercise of the right of free speech.

The right to free speech includes the right to speak in public and to the press on matters of public concern. The First Amendment has also been interpreted to protect against infringement upon a teacher's freedom concerning teaching techniques and methods. A public school teacher has a right not to be discharged, demoted or punished for the use of a teaching method not prohibited by a regulation, and as to which it is not shown that the teacher should have known that its use was prohibited. Plaintiff contends that he was removed as athletic director and head coach in part because of the coaching strategy or "game plan" employed in the Plano game.

If you find that Defendants' action in recommending to remove and/or removing Plaintiff from his position as head coach and athletic director was substantially motivated by any statements made to the press, or by Plaintiff's exercise of academic freedom, and Defendants' action would not have been taken anyway for some other valid reasons unrelated to his statements, Defendants have violated Plaintiff's First Amendment rights to free speech.

QUESTION NO. 8

Do you find, from a preponderance of the evidence, that Plaintiff's exercise of his First Amendment rights was a substantial motivating factor in Defendant Todd's recommendation that Plaintiff be removed as head coach and athletic director?

Check only one answer:

"Was a substantial motivating factor" ____✓____

"Was not a substantial motivating factor" _____

If you answered this question "Was a substantial motivating factor", go to Question No. 9. If you answered "Was not a substantial motivating factor", go to Page 22.

QUESTION NO. 9

Do you find, from a preponderance of the evidence, that Defendant Todd's action in recommending the removal of Plaintiff as head coach and athletic director would have been taken, for some other valid reason, even in the absence of any consideration of Plaintiff's exercise of first amendment rights?

On this issue Defendants have the burden of proof.

Check only one answer:

"Would have been taken"_____

"Would not have been taken" ✓

If you answered this question "Would have been taken", go to Page 22. If you answered "Would not have been taken", go to Page 19.

Liability of Defendant DISD for Violation of Constitutional Rights of Free Speech

If you find that Plaintiff's exercise of first amendment rights was a substantial motivating factor in Defendent Todd's recomendation, and that his recommendation would not have been made, for some other valid reason, in the absence of the exercise of these rights, Defendant DISD may be liable for violating Plaintiff's constitutional rights if the decision to remove Plaintiff was made solely on the basis of Defendant Todd's recommendation without any independent investigation.

QUESTION NO. 10

Do you find, from a preponderance of the evidence, that Defendant DISD's action in removing Plaintiff as head coach and athletic director was based solely on Defendant Todd's recommendation without any independent investigation?

Check only one answer:

"Was based solely" ✔

"Was not based solely" _____

If you answered this question "Was based solely", go to Question No. 11. If you answered "Was not based solely", go to Page 22.

QUESTION NO. 11

Do you find, from a preponderance of the evidence, that Defendants' action in removing Plaintiff as head coach and athletic director would have been taken, for some other valid reason, even in the absence of any consideration of Plaintiff's exercise of First Amendment rights?

On this issue Defendants have the burden of proof.

Check only one answer:

"Would have been taken" _____

"Would not have been taken" ✔

Go to Page 22.

Instructions and Definitions/Damages

It is your duty as the judges of the facts to determine the amount of money, if any, that would compensate Plaintiff Norman Jett for any damages proximately caused by violation of constitutional rights by Defendants.

In considering the issue of Plaintiff's compensatory damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and cannot be imposed or increased to penalize the Defendant.

"Proximate cause" means that cause which, in a natural and continuous sequence produces a result, and without which cause such result would not have occurred; and in order to be a proximate cause, the act complained of must be such that a person using ordinary care would have foreseen that the result, or similar result, might reasonably result therefrom. There may be more than one proximate cause of any event.

Your assessment of damages cannot be based on speculation; that is to say, you are not permitted to include in your assessment compensation for damages which, although possible, are remote or conjectural.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they include both the mental and physical aspects of injury — tangible and intangible. They are an attempt to restore the Plaintiff, that is, to make him whole or as he would be had there been no violation, if any, of his rights.

In answering the following question, you may consider the following elements of injury:

(1) Any mental anguish suffered by Plaintiff proximately caused by the violation of constitutional rights;
(2) Any lost earnings;
(3) Any damage to Plaintiff's professional reputation, and/or diminished earning capacity as a teacher/coach which he has suffered proximately caused by the violation of constitutional rights.

The term "mental anguish" implies a relatively high degree of mental pain and distress. It is more than mere disappointment, anger, resentment, or embarrassment, although it may include all of these. It includes a mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, dispair, and/or public humiliation. Mental anguish may manifest itself in physical symptoms such as hyper-activity, distractability, loss of weight, headaches, and loss of sleep.

The burden is upon Plaintiff to prove every essential element of his compensatory damage claims by a preponderance of the evidence.

Some of the items of damages, such as mental anguish, are not capable of exact measurement and there is no fixed rule for determining the proper amount of these items. Any sum awarded must be based upon the evidence presented at trial. However, because compensation for such items is not capable of exact measurement, the law leaves the amount to your sound discretion.

In connection with lost earnings, it is the duty of any person who has been injured to use reasonable diligence and reasonable means in order to reduce the amount of damages sustained by that person. In assessing any damages suffered by Plaintiff, you should account for any amounts that Plaintiff has, will or should be able to reduce or offset through reasonable diligence and reasonable means. In this connection, you are instructed that it is the Defendants' burden to prove any failure by Plaintiff to use such reasonable diligence and reasonable means.

If you find that Defendants have violated any of Plaintiff's constitutional rights, but do not find that Plaintiff has sustained any damage or injury as a result, you must, and are instructed to, award Plaintiff "nominal damages" in the amount of $1.00 in recognition of the violation of his rights.

Liability of Frederick Todd

Plaintiff has sued Defendant Frederick Todd as an individual, as well as in his capacity acting as an official of the Dallas Independent School District.

You are instructed that Defendant Todd is not liable in his individual capacity for any damages you find that Plaintiff has suffered as a result of wrongful or unconstitutional actions, if any, by Defendant Todd if you find that Defendant Todd acted in good faith. Good faith means that Defendant did not know or reasonably should not have known that the action he took would violate the constitutional rights of Plaintiff. The burden is on Defendant Todd to show, by a preponderance of the evidence, that he acted in good faith.

You are instructed, however, this "good faith defense" is only applicable to the part of this suit seeking damages from Defendant Todd in his individual capacity. Defendant Dallas Independent School District is liable for any damages sustained by Plaintiff as a result of any constitutional violations resulting from its actions, regardless of any good faith.

QUESTION NO. 12

Did Defendant Todd prove by a preponderance of the evidence that the actions that he took with regard to his recommendation concerning Plaintiff were in good faith?

Check only one answer:

"Defendant Todd did prove"_____

"Defendant Todd did not prove" ✓

If you answered this question "Did prove", go to Question No. 15. If you answered "Did not prove", go to Question No. 13.

Actual Damages Against Defendant Todd

QUESTION NO. 13

What amount of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and adequately compensate Plaintiff for his damages sustained proximately caused by Defendant Todd's actions? Answer in dollars and cents, if any.

Answer: $150,000.00

Go to next page.

Punitive Damages

In addition to compensatory damages, the law permits, under certain circumstances, to award the injured person punitive damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If you find from a preponderance of the evidence, that Defendant Todd's acts were done maliciously, wantonly or oppressively, the jury may add to the award of compensatory damages such amount as the jury deems proper as punitive damages.

An act is "maliciously" done if prompted or accompanied by ill will, or spite, or grudge. An act is "wantonly" done if done in reckless or callous disregard of, or indifference to, the rights of a person. An act is "oppressively" done if done in a way which violates the rights of another with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness of another person.

Punitive damages should only be awarded in these circumstances, and not because of any bias against or sympathy to any party.

Punitive Damages Against Defendant Todd

QUESTION NO. 14

What amount of money, if any, if paid now in cash, do you find from a preponderance of the evidence should be awarded to Plaintiff as punitive damages against Defendant Frederick Todd for any violation of constitutional rights in a malicious, wanton or oppressive manner? Answer in dollars and cents, if any.

Answer: $ 50,000.00

Go to next page.

Damages Against Defendant DISD

QUESTION NO. 15

What amount of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and adequately compensate Plaintiff for his damages sustained UNTIL the date of August 20, 1983, proximately caused by Defendant Dallas Independent School District's actions? Answer in dollars and cents, if any.

Answer: $250,000.00

Go to next page.

Constructive Termination

Plaintiff alleges that his resignation from the employment of the Dallas Independent School District was a constructive termination. In this connection you are instructed that, where the employer creates working conditions that are so intolerable that, from an objective standpoint, a reasonable person in the employee's shoes would feel compelled to resign, constructive termination occurs. If, on the other hand, you find that Plaintiff voluntarily resigned his position, no constructive termination exists.

QUESTION NO. 16

Do you find from a preponderance of the evidence that Plaintiff was constructively terminated from his employment with the Dallas Independent School District in August 1983?

Check only one answer?

"Was constructively terminated" ✓

"Was not constructively terminated" _____

QUESTION NO. 17

What amount of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and adequately compensate Plaintiff for his damages sustained ON AND AFTER the date of August 20, 1983, proximately caused by Defendant DISD's actions? Answer in dollars and cents, if any.

Answer: $400,000.00

COURT'S CHARGE TO THE JURY

(After Argument)

MEMBERS OF THE JURY:

In arriving at your verdict, it is your duty to follow the rules of law which I give to you and to find the facts of this case from the evidence introduced at the trial and in accordance with these rules of law.

You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole.

You should not consider or be influenced by the fact that during the trial of this case, counsel have made objections to the testimony, as it is their duty to do so, and it is the duty of the Court to rule on those objections in accordance with the law.

It is the function of the jury to determine the credibility of each witness and to determine the weight to be given the witness' testimony. Consider all of the circumstances under which the witness testified; the interest, if any, the witness has in the outcome of the case; the witness' appearance and demeanor while on the witness stand; the witness' apparent candor and fairness, or the lack thereof; the reasonableness or unreasonableness of the witness' testimony; and the extent to which the witness is contradicted or supported by other credible evidence. You will rely on your own good judgment and common sense in considering the evidence and determining the weight to be given it.

A witness may be discredited or "impeached" by contradictory evidence, by showing that he has testified differently concerning a material matter, or by evidence that at some other time the witness has said or done something which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

The testimony of a single witness, which produces in your minds the belief in the likelihood of truth, is sufficient for the proof of any fact, even though a greater number of witnesses may have testified to the contrary, if you believe this witness and have considered all the other evidence.

Generally speaking, there are two types of evidence which a jury may consider in properly finding the truth as to the facts in this case. One is direct evidence — such as testimony of an eye witness. The other is indirect or circumstantial evidence — the proof of a chain of circumstances which points to the existence or non-existence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts from a preponderance of all the evidence, both direct and circumstantial.

During the trial of this case, certain testimony has been read to you by way of deposition, consisting of sworn answers to questions asked of the witness in advance of the trial by the attorneys for the parties to the case. Such testimony is entitled to the same consideration and is to be judged as to credibility, and weighed, as if the witness had given from the witness stand the same testimony as given in the deposition.

In this case you have heard opinion testimony. You have heard testimony from persons we call "expert witnesses". These are witnesses who, by education and experience, have become expert in some art, science, profession or calling. Expert witnesses may state their opinions on relevant and material matters on which they are expert and they may also state the reasons for their opinions. You have also heard opinions from witnesses who are not testifying as experts, about matters which the witnesses have personally observed, and as to which the witnesses have personal knowledge or personal experience.

It is for you to consider all the opinion testimony and give it the weight you think it deserves. If you should conclude an opinion is not sound, or if you feel that an opinion is outweighed by other evidence, you may disregard the opinion entirely.

While you should consider only the evidence in the

case, you are permitted to draw reasonable inferences and deductions from the evidence. The word "infer" — or the expression "to draw an inference" means to find that a fact exists based on proof of another fact. An inference may be drawn only if it is reasonable and logical, not if it is speculative. Therefore, in deciding whether to draw an inference, you must consider all the facts in the light of reason, common sense, and experience. After you have done that, the question whether to draw a particular inference is for you to decide.

The parties to this litigation must be treated exactly alike insofar as their rights are concerned. This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A school district is entitled to the same fair trial as a private individual. All persons, including school districts, stand equal before the law, and are to be dealt with as equals in a court of justice.

You are the sole and exclusive judges of the facts. You should determine these facts without any bias, prejudice, sympathy, fear, or favor, and this determination should be made from a fair consideration of all the evidence that you have seen and heard in this trial. Do not speculate on matters which are not in evidence. Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case. Your answers and verdict must be unanimous; that is, all of you must agree to each of your answers. You will carefully and impartially consider all the evidence in the case, follow the law as stated by the court, and reach a just verdict, regardless of the consequences.

You will now reture to the jury room. In a few minutes I will send to you this charge and the exhibits which the Court has admitted into evidence. After you receive the charge and exhibits from the Court, you should select your foreperson and commence your deliberations.

If during the course of your deliberations you wish to communicate with the Court, you should do so only in writing by a note handed to the deputy marshal and signed

by the foreperson. During your deliberations you will set your own work schedule, deciding for yourselves when and how frequently you wish to recess and for how long.

After you have reached your verdict, you will return this charge together with your written answers to the foregoing questions. Do not reveal your answers until such time as you are discharged, unless otherwise directed by me.

Your foreperson will sign in the space provided below after you have reached your verdict.

BAREFOOT SANDERS
UNITED STATES DISTRICT JUDGE

Date: October_____, 1984.

VERDICT OF THE JURY

We, the jury, have answered the above and foregoing questions as indicated, and herewith return the same into Court as our verdict.

FOREPERSON

Dated: October_____, 1984

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NORMAN JETT	)	No. CA3-83-824-H
	)	
Plaintiff	)	Dallas, Texas October 9, 1984
VS.	)	9:00 O'clock A.M.
	)	
DALLAS INDEPENDENT SCHOOL DISTRICT, ET AL	)	
	)	
Defendants	)	

TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

BEFORE THE HONORABLE BAREFOOT SANDERS

APPEARANCES:

For the Plaintiff: Hill, Heard, Oneal, Gilstrap & Goetz
BY: FRANK HILL
MICHAEL A. ROSSETTI
1400 West Abram Street
Arlington, Texas 76013

For the Defendants: DeHay & Blanchard
BY: J. CARLISLE DEHAY, JR.
DAVID W. TOWNEND
2300 South Tower
Plaza of the Americas
Dallas, Texas 75201

Court Reporter: Carl T. Black
P.O. Box 501032
Dallas, Texas 75250

TESTIMONY OF DALLAS ISD SUPERINTENDENT LINUS WRIGHT

[p. 381]

Q. Please state your name, sir.

A. Linus Wright.

Q. Mr. Wright, are you the Superintendent of the Dallas Independent School District?

A. Yes, sir, I am.

[pp. 381-382]

Q. Mr. Wright, is it part of your job as Superintendent to be familiar with the policies and rules, regulations and customs of the Dallas Independent School District?

A. Yes, sir.

Q. And with particular reference to employment policies, sir?

A. Yes, sir.

Q. You are the Chief Executive Officer of the School District, are you not?

A. I am.

[pp. 382-383]

Q. And you didn't have any direct dealings with Mr. Jett or with Mr. Todd concerning the matters that we are here about and that is the removal from the Athletic Directorship and Head Coach job until this matter came to a head on or about March the 15th, 1983, did you sir?

A. That is correct.

Q. You didn't have any prior knowledge of any problems? You just weren't involved until that time?

A. That is correct.

Q. And, now, so that the jury will understand, who is Mr. John Santillo?

A. Assistant Superintendent for Personnel for the Dallas School District.

[p. 386]

Q. Am I correct in believing that the Board of Trustees of the Dallas Independent School District was not involved in the decision to remove Coach Jett from his coaching or Athletic Director job?

A. That is correct.

Q. The Board of Trustees hasn't considered it at all, has it?

A. That is correct.

Q. The end of the consideration, I guess the buck stopped with you, didn't it?

A. Yes, sir.

[pp. 386-387]

Q. By the way, had the Board of Trustees of the D.I.S.D. established any policies which set out permissible reasons for non-renewing Coach Jett's oral contract as Coach?

A. Not directly.

Q. Okay. Well, not as Coach, is that correct?

A. As coach, that is correct.

Q. The only reasons that they had set up for non-renewal related only to the teacher portion of the contract, didn't it?

A. That is correct.

[pp. 393-396]

Q. Now, there was — since you weren't involved in the transfer or removal or whatever term we are going to use here of Mr. Jett until about March the 15th of 1983, let's pick up with that date and put it in the chronology of things.

A. All right, sir.

Q. How did this developing incident first come to your attention on that date and through whom?

A. Mr. Kincaide came to my office some time on the 15th and said that he had had a conference with Coach Jett and that there was a problem developing at South Oak Cliff and that he had advised Mr. Jett to go back to the school and see if he couldn't work something out with Mr. Todd — Dr. Todd.

Q. Okay. Do you recall about what time of day that might have been?

A. No, sir, I really don't.

Q. And Mr. Kincaide was the more or less the head person in your Athletic Department at that time?

A. That is correct.

Q. Okay. Did you give Mr. Kincaide any particular directions at that time or was he just reporting that to you?

A. He reported it to me and told me what he had advised Coach Jett to do and I suggested that he go out and try to mediate things between Coach Jett and Dr. Todd.

Q. Okay. Now, let's talk — stop there for just a moment, then. At that time as you understood it did you think that there were any written policies or regulations that set out how the District was to proceed in this instance?

A. No, there was not.

Q. Okay. And similarly then there weren't any written policies or regulations as you see it that told Norm Jett how to proceed? True?

A. Well, there were policies as far as pertaining to the teacher and how he might proceed but not as a Coach or Athletic Director.

Q. But do you understand that he — the problem being brought to your attention was that somebody wanted to transfer him in all capacities?

A. That is correct.

Q. Including the teacher classification?

A. That is correct.

Q. Now, I guess because — well, let me ask. I guess maybe at that time you were looking at it. I guess maybe at that time you were looking at it primarily in his capacity as Athletic Director/Head Coach as opposed to his capacity as teacher?

A. That is correct and of course in his position in general.

Q. Yes. Now, there are very strict — let me — I am sorry, let me ask this. The Personnel Guide of the School District and its written policies, when they say teacher generally includes within that both Administrators and Coaches and all emloyees, don't they?

A. Generally that is correct.

Q. So that if one looked at the policies and the Personnel Guide of the District and it set out the due process and procedure or a transfer procedure or a demotion procedure for teachers then it would apply also and has been applied customarily by the District to all employees except non-contract employees?

A. It has not applied to administration. It has applied to all other professional employees but not Administrators per se.

Q. Well —

A. There is a separate policy for Administrators.

Q. Okay. Well, are you suggesting that Coach Jett and his Athletic Director job and Head Coaching job was an Administrator?

A. Not under the definition of an Administrator for the District. We have one for teachers and for Administrators but nothing for Athletic Director/Coach.

Q. Well, am I correct in believing though that even though your written policies don't specify Athletic Director/Coach that they have been customarily — that teacher policies have customarily applied to Athletic Director/Coach?

A. That is generally true, yes.

Q. All right. Now, I want to get a little bit ahead again and I am sorry to skip around here but when you told Mr. Kincaide to see if he could work it out I take it that what you were getting at was suggesting that he try to mediate between Dr. Todd on the one hand and Coach Jett on the other to work out the problem so that would go away, true?

A. That is correct.

Q. And that I guess was sort of just an unwritten kind of practice that you wanted to encourage?

A. That is right.

[p. 399]

Q. Now, I am going to depart again in terms of chronology here so the jury can understand, Mr. Wright, you never did personally get involved in trying to make a judgment about who was right and who was wrong, did you?

A. No, I asked my staff to do an investigation and bring me back a report and finally made that decision.

Q. But even then you really didn't examine the merits of whether Dr. Todd was right and Mr. Jett was wrong or Dr. Todd was wrong and Mr. Jett was right? You simply made a final decision to solve the problem to prevent conflict?

A. All I had heard was Coach Jett's side and there is always two sides to every problem.

Q. Yes, that is what I am getting at. You didn't base your decision on who was right and wrong, did you?

A. No, I didn't at that time.

[pp. 403-405; pp. 25-27, Partial Transcript]

Q. And it was at that meeting you say your decision was made?

A. That is correct.

Q. You also were of the opinion and perhaps you still are that the final decision was yours and that Coach Jett had no further recourse beyond that?

A. That is correct.

Q. And you were then of the opinion and still are that that was the only procedure, that is the informal meeting and conference that had transpired that existed within the D.I.S.D. to deal with the Jett situation?

A. No, it was not the only procedure but it just happened that the end results would have ended up the same because it would still have to come to me for the final decision. Coach Jett could have had the opportunity — whether he was aware of it or not I am not sure — of appealing the decision of Dr. Todd and at which time I would have appointed a panel to hear that. They would have still made the recommendation to me. Since Coach Jett came to me directly as Mr. Santillo directed him then that procedure was bypassed.

Q. Well, actually, at the time — if you would turn to Page 36 of Volume I of your deposition. On September the 15th of '83, Page 36, Line 14, you were asked the question

> "Are you aware of written policy or regulation or grievance procedure in the D.I.S.D. which would have permitted Coach Jett after you made the decision to uphold Principal Todd to then request and be given a formal hearing for the purpose of reconsideration of and possible reversal of your decision?"
>
> And you answered "I am not aware of any request," didn't you?

A. That is right.

Q. Okay. Then you were asked the question
"I mean any policy that would permit such a request and a subsequent formal hearing."
And you answered "As a teacher that would be true but as a supplemental responsibility of coaching or other responsibilities they are not afforded that opportunity."

A. After the decision had been made there is no appeal to my decision.

[p. 407; p. 29, Partial Transcript]

Q. First of all, I thought you told us a few minutes ago that the policy of the District where they say teachers are customarily applied to Coaches and Athletic Directors?

A. Except that we have a gray area that is not covered here, Mr. Hill, in that Area Superintendents don't make the decision on Athletic Directors and Coaches per se. That is left up between the Athletic Department and the principal and myself.

Q. Is there any written statement of that?

A. No, sir, there is not.

[p. 423; p. 45, Partial Transcript]

Q. Now, with respect to Coaches and Athletic Directors I believe you have indicated several times here there is no specific policy that covers that?

A. Not per se, no.

Q. But you have developed some practices that you attempt to follow within the District when those problems arise?

A. That is correct.

[pp. 429-431; pp. 51-53, Partial Transcript]

A. Of course, when I received the call from Mr. Santillo he was in a conference with Coach Jett at that time and he suggested that we had a serious problem in South Oak Cliff

and that he had been to Mr. Kincaid and been to him and he suggested that I should talk with Coach Jett and of course sent him over and I talked to Coach Jett.

Q. All right. And that occurred on March when?

A. March 13th.

Q. And do you recall at that time what Coach Jett said to you in that meeting and if so tell us?

A. Several things that Coach Jett told me. Of course, he reviewed for me first his career and his win-loss record and most of the things we heard Coach Jett testify about. The number of players that played professional football and the number of college scholarships and so forth. Of course the substance of it then when we got down to asking him the reasons why that Dr. Todd had recommended that he be transferred, he thought and expressed to me at that time he thought Dr. Todd had wanted a black Coach and was trying to find a way to get rid of him and so I asked Coach Jett in his opinion why did Dr. Todd make the recommendation he did and of course he talked about the problems of going back to the original principal and financial things that he testified about yesterday. The principal I believe was McWhorter and that how he had established an athletic program at South Oak Cliff that was second to none and which I think we all agreed with that and that he felt that Dr. Todd was interfering with that program and that Dr. Todd was making some unreasonable demands on him so I asked Coach Jett if Dr. Todd, the principal in charge of the school, and that if he was making any unreasonable demands on him and he said he thought he was that whenever he forced him or caused him to have to come to teachers' meetings or faculty meetings and keep records of inventory and things like that that he thought that was unreasonable, that it was preventing him from doing his job and I said "Coach Jett, as a principal if you were the principal of that building would you consider that unreasonable" because I am charging that Dr. Todd as principal of the school to see that instruction takes place, that teachers have proper lesson plans and everybody accounts for things and I don't consider that

unreasonable. I said "You know, it appears to me that there is a conflict between you two and when that happens, and I have to consider the principal's side of the story too, which I hadn't heard, but that if it happened the way he described it then I would suggest he should consider taking an assignment somewhere else because it appeared to me they are having difficulty working together, but that I assured him I had every confidence in the world in him and his ability and that whatever happened I would see to it that we would take care of him some way and that we would find a position for him somewhere else but it appeared that they were having difficulty reconciling their differences but I would like to have an opportunity to investigate it and would give him a decision as soon as I could.

So of course it appeared that at the time that Coach Jett was of the opinion that it was a racial situation that Coach Todd — that Principal Todd wanted a black coach and that for that reason he was recommending that he be transferred somewhere else and that he felt that Dr. Todd was placing some unreasonable demands on him and that is when I suggested to him I thought he should consider leaving.

[pp. 432-433; pp. 54-55, Partial Transcript]

Q. Now, after this conference with Mr. Jett did you have subsequent conferences with members of your staff?

A. Yes. I immediately went to Dr. Reed who is Mr. Kincaid's supervisor and asked Dr. Reed to work with Mr. Kincaid to check out to find out what the problems were at South Oak Cliff and why we had the situation and I also asked Dr. Bell, who is the Assistant Superintendent for that sub District and Dr. Leon Hayes who is Dr. Todd's immediate supervisor to look into the matter and find out everything that they could about the situation and we will get back together and make a recommendation then as to what action I will take.

Q. And it was a week later, 3-25-83, that you all got back together?

A. Yes.

Q. And Dr. Todd was in attendance at that meeting?

A. Dr. Todd, yes, he was present.

[pp. 434-435; pp. 56-57, Partial Transcript]

Q. And can you . t this time summarize the substance of that meeting?

A. Well, I — w reviewed my conversation with Coach Jett and Mr. Kin I reviewed his and each person reviewed their finding all of them came to the conclusion that there were irre ble differences between Dr. Todd and Coach Jett. The dn't think that the two men could work together in the me building and so I concluded from that I would recomm eroving Coach Jett to another position but also with th derstanding that there wasn't a person there that didn't feel that the decision of transfer had to occur but there was other places in this District for Coach Jett and that everyone there made a comment they were going to try to find that position and Coach Jett had something to offer the District. We had something here that is unfortunate that happens a lot of time between two people and when it occurs someone has to give and I have to make that judgment decision as to who has to go and in this case it was Coach Jett but we all were of the opinion that we still wanted Coach Jett in some other position, another coaching Head Directorship as soon as one opened up.

Q. And as a result at the conclusion of that meeting you made a decision?

A. I did.

TESTIMONY OF DALLLAS ISD
ASSISTANT SUPERINTENDENT JOHN SANTILLO

[p. 456; p. 78, Partial Transcript]

Q. You are not involved in the day-to-day supervision or

evaluation of Mr. Jett either as a teacher or Athletic Director/Head Coach?

A. Not directly, no, sir.

Q. And you don't have any personal knowledge of the allocations or incidents underlying the dispute about why Coach Jett was going to be removed?

A. No, sir.

[pp. 457-459; pp. 79-81, Partial Transcript]

Q. How that first came to your attention?

A. Mr. Kincaid sent me a letter, carbon copy of the letter that Dr. Todd had written to Mr. Kincaid relative to Mr. Jett and Mr. Jett came to see me as I recall approximately at eight o'clock on Friday, March the 18th.

Q. Would that be in the morning?

A. Yes, sir.

Q. Okay. And your recollection is the first time he went to see you?

A. That is my recollection, yes, sir.

Q. Okay. Did he tell you he had been fired?

A. I don't remember that term being used.

Q. Okay. Well, did he inform you that he was being relieved of his Athletic Director/Head Coach duties?

A. Yes, sir.

Q. Did you observe -- could you observe what emotional condition he was in at that time?

A. Well, he was quite disturbed.

Q. Can you describe for me?

A. Well, as any normal reaction he was quite disturbed and upset and frustrated and I would say angry.

Q. And was he seeking guidance from you as to what to do next or what?

A. I don't think he requested guidance from me. We discussed the situation.

Q. All right. And at that time did you advise him to accept some temporary assignment and wait for another opportunity to return to coaching?

A. As I recall, Mr. Hill, I recommended to Mr. Jett that he return to South Oak Cliff High School and try to resolve the situation and we would discuss the matter with the appropriate officials and try to bring a resolution to the situation.

Q. Okay. Did he leave alone or did you two leave your office together that day?

A. As I recall as a result of what Mr. Jett said to me I called the General Superintendent's office.

Q. At that time?

A. Yes, sir. And asked Mr. Wright if he could possibly see Mr. Jett in view of the statements Mr. Jett made.

Q. What had Mr. Jett told you?

A. Mr. Jett indicated to me that there were racial overtones in Dr. Todd's decision and I remember quite clearly that Mr. Jett said Dr. Todd should be the one who is fired instead of me and he made some other further statements but I do remember those two particular statements quite accurately.

Q. And was he seeking guidance from you as to what to do next or what?

A. I don't think he requested guidance from me. We discussed the situation.

Q. All right. And at that time did you advise him to accept some temporary assignment and wait for another opportunity to return to coaching?

A. As I recall, Mr. Hill, I recommended to Mr. Jett that he return to South Oak Cliff High School and try to resolve the situaton and we would discuss that matter with the ap-

propriate officials and try to bring a resolution to the situation.

Q. Okay. Did he leave alone or did you two leave your office together that day?

A. As I recall as a result of what Mr. Jett said to me I called the General Superintendent's office.

Q. At that time?

A. Yes, sir. And asked Mr. Wright if he could possibly see Mr. Jett in view of the statements Mr. Jett made.

Q. What had Mr. Jett told you?

A. Mr. Jett indicated to me that there were racial overtones in Dr. Todd's decision and I remember quite clearly that Mr. Jett said Dr. Todd should be the one who is fired instead of me and he made some other further statements but I do remember those two particular statements quite accurately.

Q. Okay. And I guess then based primarily on those things you felt the need to get an audience with Superintendent Wright immediately?

A. Yes, sir.

Q. And you did so?

A. Yes, sir, I called Mr. Wright's office and as I recall his secretary indicated that Mr. Jett should come over. He might have to wait for a short time but Mr. Wright would see him.

Q. Did you go with him?

A. No, sir.

Q. And the last you saw then I suppose of Coach Jett that day you saw him leave presumably to go to see Superintendent Wright?

A. Yes, sir.

Q. Did you speak with Superintendent Wright later in the day about it?

A. I don't recall speaking to Superintendent Wright in the day.

Q. What is the next thing you do recall about the incident so far as you were concerned?

A. On Friday March the 25th at approximately five o'clock in the afternoon there was a meeting with Mr. Wright present and some other school officials and myself and we were reviewing the Norman Jett situation.

Q. Dr. Todd was there?

A.Yes, sir.

Q. Norman Jett was not there?

A. Norman Jett was not there.

[pp. 460-461; pp. 82-83, Partial Transcript]

Q. Was any report of any investigation that had been made in connection with the allegations in the letter?

A. Not to my knowledge.

Q. And insofar as you know there really hadn't been any investigation undertaken had there?

A. Not to my knowledge.

Q. Now, at the conclusion of that meeting were you instructed — let me back up. Prior to that meeting had you heard Mr. Wright say whether he had decided what to do?

A. No, sir, he had not.

Q. At that meeting did he tell you he had decided what to do?

A. Yes, sir.

Q. And that was to agree with the principal and move Mr. Jett?

A. Mr. Wright directed my office to reassign Mr. Jett.

TESTIMONY OF DALLAS ISD ATHLETIC DIRECTOR JOHN KINCAIDE

[p. 616]

Q. Would you please state your name, sir.

A. John Kincaide.

Q. Mr. Kincaide, what is your position with the Dallas Independent School District?

A. Athletic Director.

Q. And will you generally describe your duties and responsibilities?

A. The Department is responsible for the implementation of the competitive athlete program in the Dallas Independent School District.

[pp. 627-628]

Q. Sir, as of — in your mind as of the things that you were personally aware of, are you aware of any good reasons why Coach Jett should have been relieved of his Athletic Director responsibilities?

A. Being peronally aware of my direct association and communications with Coach Jett, no, I would say not that I know of any good reason.

UNITED STATES CONSTITUTIONAL PROVISIONS

Thirteenth Amendment

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiciton.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Fourteenth Amendment
[Sections (1) and (5)]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Fifteenth Amendment

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

STATUTES
United States Code

18 U.S.C. § 241

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured –

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 242

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section –

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C § 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Revised Statutes

Title 70, Chapter 7
"Crimes Against the Elective Franchise and Civil Rights of Citizens" (1874)

Sec. 5506. Every person who, by any unlawful means, hinders, delays, prevents, or obstructs, or combines and confederates with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote, or from voting at any election in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be fined not less than five hundred dollars, or be imprisoned not less than one month nor more than one year, or be punished by both such fine and imprisonment.

Sec. 5507. Every person who prevents, hinders, controls, or intimidates another from exercising, or in exercising the right of suffrage, to whom that right is guaranteed by the fifteenth amendment to the Constitution of the United States, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section.

Sec. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

United States Statutes at Large

Civil Rights Act of April 9, 1866
(c. 31, 14 Stat. 27)

CHAP. XXXL — *An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Sec. 2. *And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Sec. 3. *And be it further enacted,* That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said

courts in the trial and disposition of such cause, and if of acriminal nature, in the infliction of punishment on the party found guilty.

Sec. 4. *And be it further enacted*, That the district attorneys, marshals, and deputy marshals of the United States, the commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting, imprisoning, or bailing offenders against the laws of the United States, the officers and agents of the Freedmen's Bureau, and every other officer who may be specially empowered by the President of the United States, shall be, and they are hereby, specially authorized and required, at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States or territorial court as by this act has cognizance of the offence. And with a view to affording reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race or color, or previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, and to the prompt discharge of the duties of this act, it shall be the duty of the circuit courts of the United States and the superior courts of the Territories of the United States, from time to time, to increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with a violation of this act, and the same duties with regard to offences created by this act, as they are authorized by law to exercise with regard to other offences against the laws of the United States.

Sec. 5. *And be it further enacted*, That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant or other process when tendered, or to use all proper means diligently to ex-

ecute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of the person upon whom the accused is alleged to have committed the offence. And the better to enable the said commissioners to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States and the requirements of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; and the persons so appointed to execute any warrant or process as aforesaid shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the clause of the Constitution which prohibits slavery, in conformity with the provisions of this act; and said warrants shall run and be executed by said officers anywhere in the State or Terriroty within which they are issued.

Sec. 6. *And be it further enacted*, That any person who shall knowingly and wilfully obstruct, hinder, or prevent any officer, or other person charged with the execution on any warrant or process issued under the provisions of this act, or any person or persons lawfully assisting him or them, from arresting any person for whose apprehension such warrant or process may have been issued, or shall rescue or attempt to rescue such person from the custody of the officer, other person or persons, or those lawfully assisting as aforesaid, when so arrested pursuant to the authority herein given and declared, or shall aid, abet, or assist any person so arrested as aforesaid, directly or indirectly, to escape from the custody of the officer or other person legally authorized as aforesaid, or shall harbor or conceal any person for whose arrest a warrant or process shall have been issued as aforesaid, so as to prevent his discovery and

arrest after notice or knowledge of the fact that a warrant has been issued for the apprehension of such person, shall, for either of said offences, be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, by indictment and conviction before the district court of the United States for the district in which said offence may have been committed, or before the proper court of criminal jurisdiction, if committed within any one of the organized Territories of the United States.

Sec. 7. *And be it further enacted*, That the district attorneys, the marshals, their deputies, and the clerks of the said district and territorial courts shall be paid for their services the like fees as may be allowed to them for similar services in other cases; and in all cases where the proceedings are before a commissioner, he shall be entitled to a fee of ten dollars in full for his services in each case, inclusive of all services incident to such arrest and examination. The person or persons authorized to execute the process to be issued by such commissioners for the arrest of offenders against the provisions of this act shall be entitled to a fee of five dollars for each person he or they may arrest and take before any such commissioner as aforesaid, with such other fees as may be deemed reasonable by such commissioner for such other additional services as may be necessarily performed by him or them, such as attending at the examination, keeping the prisoner in custody, and providing him with food and lodging during his detention, and until the final determination of such commissioner, and in general for performing such other duties as may be required in the premises; such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper district or county, as near as may be practicable, and paid out of the Treasury of the United States on the certificate of the judge of the district within which the arrest is made, and to be recoverable from the defendant as part of the judgment in case of conviction.

Sec. 8. *And be it further enacted*, That whenever the President of the United States shall have reason to believe

that offences have been or are likely to be committed against the provisions of this act within any judicial district, it shall be lawful for him, in his discretion, to direct the judge, marshal, and district attorney of such district to attend at such place within the district, and for such time as he may designate, for the purpose of the more speedy arrest and trial of persons charged with a violation of this act; and it shall be the duty of every judge or other officer, when any such requisition shall be received by him, to attend at the place and for the time therein designated.

Sec. 9. *And be it further enacted*, That it shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and enforce the due execution of this act.

Sec. 10. *And be it further enacted*, That upon all questions of law arising in any cause under the provisions of this act a final appeal may be taken to the Supreme Court of the United States.

Civil Rights Act of May 31, 1870
(c. 114, 16 Stat. 140)

CHAP. CXIV — *An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

Sec. 2. *And be it further enacted*, That if by or under the authority of the constitution or laws of any State, or the laws of any Territory, any act is or shall be required to be done as a prerequisite or qualification for voting, and by such constitution or laws persons or officers are or shall be charged with the performance of duties in furnishing to citizens an opportunity to perform such prerequisite, or to become qualified to vote, it shall be the duty of every such person and officer to give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote without distinction of race, color, or previous condition of servitude; and if any such person or officer shall refuse or knowingly omit to give full effect to this section, he shall, for every offence, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just, and shall also, for every such offence, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

Sec. 3. *And be it further enacted*, That whenever, by or under the authority of the constitution or laws of any State, or the laws of any Territory, any act is or shall be required to [be] done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid shall, if it fail to be carried into execution by reason of the wrongful act or omission aforesaid of the person or officer charged with the duty of receiving or permitting such performance or offer to perform, or acting hereon, be deemed and held as a performance in law of such act; and the person so offering and failing as aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner and to the same extent as if he had in fact performed such act: and any judge, inspector, or other officer of election whose duty it is or shall be to receive, count, certify, register, report, or give effect to the

vote of any such citizen who shall wrongfully refuse or omit to receive, count, certify, register, report, or give effect to the vote of such citizen upon the presentation by him of his affidavit stating such offer and the time and place thereof, and the name of the officer or person whose duty it was to act thereon, and that he was wrongfully prevented by such person or officer from performing such act, shall for every such offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just, and shall also for every such offence be guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

Sec. 4. *And be it further enacted*, That if any person, by force, bribery, threats, intimidations, or other unlawful means, shall hinder, delay, prevent, or obstruct, or shall combine and confederate with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote or from voting at any election as aforesaid, such person shall for every such offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just, and shall also for every such offence be guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

Sec. 5. *And be it further enacted*, That if any person shall prevent, hinder, control, or intimidate, or shall attempt to prevent, hinder, control, or intimidate, any person from exercising or in exercising the right of suffrage, to whom the right of suffrage is secured or guaranteed by the fifteenth amendment to the Constitution of the United States, by means of bribery, threats, or threats of depriving such person of employment or occupation, or of ejecting such person

from rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, such person so offending shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

Sec. 6. *And be it further enacted*, That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,—the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years,—and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

Sec. 7. *And be it further enacted*, That if in the act of violating any provision in either of the two preceding sections, any other felony, crime, or misdemeanor shall be committed, the offender, on conviction of such violation of said sections, shall be punished for the same with such punishments as are attached to the said felonies, crimes, and misdemeanors by the laws of the State in which the offence may be committed.

Sec. 8. *And be it further enacted*, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, arising under this act, except as herein otherwise provided,

and the jurisdiction hereby conferred shall be exercised in conformity with the laws and practice governing United States courts; and all crimes and offences committed against the provisions of this act may be prosecuted by the indictment of a grand jury, or, in cases of crimes and offences not infamous, the prosecution may be either by indictment or information filed by the district attorney in a court having jurisdiction.

Sec. 9. *And be it further enacted*, That the district attorneys, marshals, and deputy marshals of the United States, the commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting, imprisoning, or bailing offenders against the laws of the United States, and every other officer who may be specially empowered by the President of the United States, shall be, and they are hereby, specialy authorized and required, at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States or territorial court as has cognizance of the offense. And with a view to afford reasonable protection to all persons in their constitutional right to vote without distinction of race, color, or previous condition of servitude, and to the prompt discharge of the duties of this act, it shall be the duty of the circuit courts of the United States, and the superior courts of the Territories of the United States, from time to time, to increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with a violation of this act; and such commissioners are hereby authorized and required to exercise and discharge all the powers and duties conferred on them by this act, and the same duties with regard to offences created by this act as they are authorized by law to exercise with regard to other offences against the laws of the United States.

Sec. 10. *And be it further enacted*, That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant or other process when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of the person deprived of the rights conferred by this act. And the better to enable the said commissioners to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States and the requirements of this act, they are hereby authorized and empowered, within their districts respectively, to appoint, in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties, and the persons so appointed to execute any warrant or process as aforesaid shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the fifteenth amendment to the Constitution of the United States; and such warrants shall run and be executed by said officers anywhere in the State or Territory within which they are issued.

Sec. 11. *And be it further enacted*, That any person who shall knowingly and wilfully obstruct, hinder, or prevent any officer or other person charged with the execution of any warrant or process issued under the provisions of this act, or any person or persons lawfully assisting him or them from arresting any person for whose apprehension such warrant or process may have been issued, or shall rescue or attempt to rescue such person from the custody of the officer or other person or persons, or those lawfully assisting as aforesaid, when so arrested pursuant to the authority

herein given and declared, or shall aid, abet, or assist any person so arrested as aforesaid, directly or indirectly, to escape from the custody of the officer or other person legally authorized as aforesaid, or shall harbor or conceal any person for whose arrest a warrant or process shall have been issued as aforesaid, so as to prevent his discovery and arrest after notice or knowledge of the fact that a warrant has been issued for the apprehension of such person, shall, for either of said offences, be subject to a fine not exceeding one thousand dollars, or imprisonment not exceeding six months, or both, at the discretion of the court, on conviction before the district or circuit court of the United States for the district or circuit in which said offence may have been committed within any one of the organized Territories of the United States.

Sec. 12. *And be it further enacted*, That the commissioners, district attorneys, the marshals, their deputies, and the clerks of the said district, circuit, and territorial courts shall be paid for their services the like fees as may be allowed to them for similar services in other cases. The person or persons authorized to execute the process to be issued by such commissioners for the arrest of offenders against the provisions of this act shall be entitled to the usual fees allowed to the marshal for an arrest for each person he or they may arrest and take before any such commissioner as aforesaid, with such other fees as may be deemed reasonable by such commissioner for such other additional services as may be necessarily performed by him or them, such as attending at the examination, keeping the prisoner in custody, and providing him with food and lodging during his detention and until the final determination of such commissioner, and in general for performing such other duties as may be required in the premises; such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper district or county as near as may be practicable, and paid out of the treasury of the United States on the certificate of the judge of the district within which the arrest is made, and to be recoverable from the defendant as part of the judgment in

case of conviction.

Sec. 13. *And be it further enacted*, That it shall be lawful for the President of the United States to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to aid in the execution of judicial process issued under this act.

Sec. 14. *And be it further enacted*, That whenever any person shall hold office, except as a member of Congress or of some State legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the United States, it shall be the duty of the district attorney of the United States for the district in which such person shall hold office, as aforesaid, to proceed against such person, by writ of quo warranto, returnable to the circuit or district court of the United States in such district, and to prosecute the same to the removal of such person from office; and any writ of quo warranto, so brought, as aforesaid, shall take precedence of all other cases on the docket of the court to which it is made returnable, and shall not be continued unless for cause proved to the satisfaction of the court.

Sec. 15. *And be it further enacted*, That any person who shall hereafter knowingly accept or hold any office under the United States, or any State to which he is ineligible under the third section of the fourteenth article of amendment of the Constitution of the United States, or who shall attempt to hold or exercise the duties of any such office, shall be deemed guilty of a misdemeanor against the United States, and, upon conviction thereof before the circuit or district court of the United States, shall be imprisoned not more than one year, or fined not exceeding one thousand dollars, or both, at the discretion of the court.

Sec. 16. *And be it further enacted*, That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, and give evidence, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance,

regulation, or custom, to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void.

Sec. 17. *And be it further enacted*, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Sec. 18. *And be it further enacted*, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

Sec. 19. *And be it further enacted*, That if at any election for representative or delegate in the Congress of the United States any person shall knowingly personate and vote, or attempt to vote, in the name of any other person, whether living, dead, or fictitious; or vote more than once in the same election for any candidate for the same office; or vote at a place where he may not be lawfully entitled to vote; or vote without having a lawful right to vote; or do any unlawful act to secure a right or an opportunity to vote for himself or any other person; or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or otherwise unlawfully prevent any qualified voter of any State of the United States of America, or of any Territory thereof, from

freely exercising the right of suffrage, or by any such means induce any voter to refuse to exercise such right; or compel or induce by any such means, or otherwise, any officer of an election in any such State or Territory to receive a vote from a person not legally qualified or entitled to vote; or interfere in any manner with any officer of said elections in the discharge of his duties; or by any of such means, or other unlawful means, induce any officer of an election, or officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty, or any law regulating the same; or knowingly and wilfully receive the vote of any person not entitled to vote, or refuse to receive the vote of any person entitled to vote; or aid, counsel, procure, or advise any such voter, person, or officer to do any act hereby made a crime, or to omit to do any duty the omission of which is hereby made a crime, or attempt to do so, every such person shall be deemed guilty of a crime, and shall for such crime be liable to prosecution in any court of the United States of competent jurisdiction, and, on conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term not exceeding three years, or both, in the discretion of the court, and shall pay the costs of prosecution.

Sec. 20. *And be it further enacted*, That if, at any registration of voters for an election for representative or delegate in the Congress of the United States, any person shall knowingly personate and register, or attempt to register, in the name of any other person, whether living, dead, or fictitious, or fraudulenty register, or fraudulently attempt to register, not having a lawful right so to do; or do any unlawful act to secure registration for himself or any other person; or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or other unlawful means, prevent or hinder any person having a lawful right to register from duly exercising such right; or compel or induce, by any of such means, or other unlawful means, any officer of registration to admit to registration any person not

legally entitled thereto, or interfere in any manner with any officer of registration in the discharge of his duties, or by any such means, or other unlawful means, induce any officer of registration to violate or refuse to comply with his duty, or any law regulating the same; or knowingly and wilfully receive the vote of any person not entitled to vote, or refuse to receive the vote of any person entitled to vote, or aid, counsel, procure, or advise any such voter, person, or officer to do any act hereby made a crime, or to omit any act, the omission of which is hereby made a crime, every such person shall be deemed guilty of a crime, and shall be liable to prosecution and punishment therefor, as provided in section nineteen of this act for persons guilty of any of the crimes therein specified: *Provided*, That every registration made under the laws of any State or Territory, for any State or other election at which such representative or delegate in Congress shall be chosen, shall be deemed to be a registration within the meaning of this act, notwithstanding the same shall also be made for the purposes of any State, territorial, or municipal election.

Sec. 21. *And be it further enacted*, That whenever, by the laws of any State or Territory, the name of any candidate or person to be voted for as representative or delegate in Congress shall be required to be printed, written, or contained in any ticket or ballot with other candidates or persons to be voted for at the same election for State, territorial, municipal, or local officers, it shall be sufficient prima facie evidence, either for the purpose of indicting or convicting any person charged with voting, or attempting or offering to vote, unlawfully under the provisions of the preceding sections, or for committing either of the offenses thereby created, to prove that the person so charged or indicted, voted, or attempted or offered to vote, such ballot or ticket, or committed either of the offenses named in the preceding sections of this act with reference to such ballot. And the proof and establishment of such facts shall be taken, held, and deemed to be presumptive evidence that such person voted, or attempted or offered to vote, for such representative or delegate, as the case may be or that such offense

was committed with reference to the election of such representative or delegate, and shall be sufficient to warrant his conviction unless it shall be shown that any such ballot, when cast, or attempted or offered to be cast, by him, did not contain the name of any candidate for the office of representative or delegate in the Congress of the United States, or that such offense was not committed with reference to the election of such representative or delegate.

Sec. 22. *And be it further enacted*, That any officer of any election at which any representative or delegate in the Congress of the United States shall be voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, territorial, district, or municipal law or authority, who shall neglect or refuse to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or violate any duty so imposed, or knowingly do any act thereby unauthorized, with intent to affect any such election, or the result thereof; or fraudulently make any false certificate of the result of such election in regard to such representative or delegate; or withhold, conceal, or destroy any certificate of record so required by law respecting, concerning, or pertaining to the election of any such representative or delegate; or neglect or refuse to make and return the same as so required by law; or aid, counsel, procure, or advise any voter, person, or officer to do any act by this or any of the preceding sections made a crime; or to omit to do any duty the omission of which is by this or any of said sections made a crime, or attempt to do so, shall be deemed guilty of a crime and shall be liable to prosecution and punishment therefor, as provided in the nineteenth section of this act for persons guilty of any of the crimes therein specified.

Sec. 23. *And be it further enacted*, That whenever any person shall be defeated or deprived of his election to any office, except elector of President or Vice-President, representative or delegate in Congress, or member of a State legislature, by reason of the denial to any citizen or

citizens who shall offer to vote, of the right to vote, on account of race, color, or previous condition of servitude, his right to hold and enjoy such office, and the emoluments thereof, shall not be impaired by such denial; and such person may bring any appropriate suit or proceeding to recover possession of such office, and in cases where it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offered to vote, on account of race, color, or previous condition of servitude, such suit or proceeding may be instituted in the circuit or district court of the United States of the circuit or district in which such person resides. And said circuit or district court shall have, concurrently with the State courts, jurisdiction thereof so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the fifteenth article of amendment to the Constitution of the United States, and secured by this act.

Approved, May 31, 1870.

Civil Rights Act of April 20, 1871
(c. 114, 17 Stat. 13)

CHAP. XXIIA—*An Act to Enforce the Provisions of the Fourteenth Amendement to the Constitution of the United States, and for other Purposes.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in

the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

Sec. 2. That if two or more persons wihtin any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force, the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, or by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the United States, or to

injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of person of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right

or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United Staes in their civil rights, and to furnish the means of their vindication."

Sec. 3. That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any State shall so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by this act, and the constituted authorities of such States shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States; and in all such cases, or whenever any such insurrection, violence, unlawful combination, or conspiracy shall oppose or obstruct the laws of the United States or the due execution thereof, or impede or obstruct the due course of justice under the same, it shall be lawful for the President, and it shall be his duty to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary for the suppression of such insurrection, domestic violence, or combinations; and any person who shall be arrested under the provisions of this and the preceding section shall be delivered to the marshal of the proper district, to be dealt with according to the law.

Sec. 4. That whenever in any State or part of a State the unlawful combinations named in the preceding section of this act shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State, or when the constituted authorities are in complicity with, or shall connive at the unlawful purposes of, such powerful and armed combinations; and whenever, by reason of either or all of the causes aforesaid, the conviction of such offenders and the preservation of the public safety shall become in such district impracticable, in every such case such combinations shall be deemed a rebellion against the government of the United States, and during the continuance of such rebellion, and within the limits of the district which shall be so under the sway thereof, such limits to be prescribed by proclamation, it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privileges of the writ of habeas corpus, to the end that such rebellion may be overthrown: *Provided*, That all the provisions of the second section of an act titled "An act relating to habeas corpus, and regulating judicial proceedings in certain cases," approved March third, eighteen hundred and sixty-three, which relate to the discharge of prisoners other than prisoners of war, and to the penalty for refusing to obey the order of the court, shall be in full force so far as the same are applicable to the provisions of this section: *Provided further*, That the President shall first have made proclamation, as now provided by law, commanding such insurgents to disperse: *And provided also*, That the provisions of this section shall not be in force after the end of the next regular session of Congress.

Sec. 5. That no person shall be a grand or petit juror in any court of the United States upon any inquiry, hearing, or trial of any suit, proceeding, or prosecution based upon or arising under the provisions of this act who shall, in the judgment of the court, be in complicity with any such combination or conspiracy; and every such juror shall, before

entering upon any such inquiry, hearing, or trial, take and subscribe an oath in open court that he has never, directly or indirectly, counselled, advised, or voluntarily aided any such combination or conspiracy; and each and every person who shall take this oath, and shall therein swear falsely, shall be guilty of perjury, and shall be subject to the pains and penalties declared against that crime, and the first section of the act entitled "An act defining additional causes of challenge and prescribing an additional oath for grand and petit jurors in the United States courts," approved June seventeenth, eighteen hundred and sixty-two, be, and the same is hereby, repealed.

Sec. 6. That any person or persons, having knowledge that any of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse so to do, and such wrongful act shall be committed, such person or persons shall be liable to the person injured, or his legal representatives, for all damages caused by any such wrongful act which such first-named person or persons by reasonable diligence could have prevented; and such damages may be recovered in an action on the case in the proper circuit court of the United States, and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in such action: *Provided*, That such action shall be commenced within one year after such cause of action shall have accrued; and if the death of any person shall be caused by any such wrongful act and neglect, the legal representatives of such deceased person shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of such deceased person, if any there be, or if there be no widow, for the benefit of the next of kin of such deceased person.

Sec. 7. That nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto; and any offences heretofore committed against the tenor of any former act

shall be prosecuted, and any proceeding already commenced for the prosecution thereof shall be continued and completed, the same as if this act had not been passed, except so far as the provisions of this act may go to sustain and validate such proceedings.

Approved, April 20, 1871.

No. 87-2084

Norman Jett,

Petitioner

v.

Dallas Independent School District

ORDER ALLOWING CERTIORARI Filed November 7, 1988

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, limited to Question 1 presented by the petition. This case is consolidated with case No. 88-214, Dallas Independent School District v. Norman Jett and a total of one hour is allotted for oral argument.

November 7, 1988

No. 88-214

Dallas Independent School District,

Petitioner

v.

Norman Jett

ORDER ALLOWING CERTIORARI Filed November 7, 1988

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. This case is consolidated with case No. 88-2084, Norman Jett v. Dallas Independent School District and a total of one hour is allotted for oral argument.

November 7, 1988

Supreme Court, U.S.
FILED
JAN 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2084 (5)
No. 88-214 (5)

In The

Supreme Court of the United States

October Term, 1988

NORMAN JETT,

Petitioner,

vs.

DALLAS INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

FRANK GILSTRAP *
FRANK HILL
SHANE GOETZ
Hill, Heard, Oneal
Gilstrap & Goetz
1400 West Abram Street
Arlington, Texas 76013
(817) 261-2222

Counsel for Petitioner

*Counsel of Record

PETITION FOR CERTIORARI IN CASE NO. 87-2084 FILED JUNE 21, 1988

CROSS-PETITION FOR CERTIORARI IN CASE NO. 88-214 FILED JULY 21, 1988

CASES CONSOLIDATED AND CERTIORARI GRANTED IN BOTH CASES NOVEMBER 7, 1988

QUESTIONS PRESENTED

1. Must a local government employee who claims job discrimination on the basis of race show that the discrimination resulted from official "policy or custom" to recover from the employer under 42 U.S.C. § 1981?

2. Was the Fifth Circuit's decision, that a local government could be liable for damages under 42 U.S.C. § 1981 and § 1983 because of an employee transfer decision made by a non-policymaker, who was not following official policy or custom, contrary to the recent decision of *City of St. Louis v. Praprotnik*, _____U.S._____, 108 S. Ct. 915, 99 L.Ed.2d 107 (1988)?

LIST OF ALL PARTIES

Petitioner	Norman Jett
Respondent	Dallas Independent School District

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
LIST OF ALL PARTIES ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL PROVISIONS AND STATUTES ... 2
STATEMENT 3
SUMMARY OF ARGUMENT 7
ARGUMENT 11

I. A local government employee who claims job discrimination on the basis of race need not show that the discrimination resulted from official "policy or custom" to recover from the employer under 42 U.S.C. § 1981 11

A. The "policy or custom" requirement arose from the language of 42 U.S.C. § 1983 11

1. Background 11
2. Origin of the "policy or custom" requirement 12

B. Section 1983 did not amend Section 1981 14

1. Section 1981 was not passed by the 42nd Congress, but by an earlier Congress 14
2. Absent clear historical evidence one cannot conclude that, by passing Section 1983, Congress imposed a "policy or custom" requirement on Section 1981 15
3. Congress did not intend for Section 1983 to amend Section 1981 18

C. The history and language of § 1981 show that Congress did not intend to include a "policy or custom" requirement in that statute 21

II. The familiar rule of *respondeat superior* offers the most suitable standard for § 1981 liability .. 26

A. Considerations of legislative intent require imposition of a *respondeat superior* standard 26

B. 42 U.S.C. § 1988 also compels adoption of a *respondeat superior* standard 27

C. Policy arguments favor adoption of a *respondeat superior* standard 29

1. A rule of *respondeat superior* will further the policies of eradicating racial discrimination, compensating for civil rights deprivations, and deterring abuses of power 29

2. *Respondeat superior* provides a clear, easily applied standard 30

3. The policies that favor restricting liability under Section 1988 do not apply to Section 1981 30

4. Other alternatives 31

III. There was evidence from which the jury could conclude that Superintendent Wright was a "policymaker" with regard to transfers of coaches and athletic directors 31

CONCLUSION 33

TABLE OF AUTHORITIES

Cases — Page

Adickes v. S. H. Kress Co., 398 U.S. 144, 90 S.Ct. 1598, 2 L.Ed. 142 (1970) 14

Bates v. City of Houston, 189 S.W. 2d 17 (Tex. Civ. App. - Galveston 1945, writ ref'd w.o.m.) 29

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) 30

Board of Regents v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980) 29

Burnett v. Grattan, 468 U.S. 42, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984) 29

Butz v. Economou, 483 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) 30

Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) 27

Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) 29

Carlson v. Green, 446 U.S. 14, 100 S.Ct. 1468, 64 .Ed.2d 15 (1980) 29, 30

Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979) 17

City of Galveston v. Posnainsky, 62 Tex. 118 (Tex. 1884) 29

City of Gladewater v. Pike, 727 S.W.2d 514 (Tex. 1987) 29

City of Houston v. Quinones, 142 Tex. 282, 177 S.W.2d 259 (1943) 29

City of Midland v. Hamlin, 239 S.W.2d 159 (Tex. Civ. App. - El Paso 1950, no writ) 29

City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed. 616 (1981) 26, 30

City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985) 13, 27, 33

Cases — Page

City of Orange v. LaCoste, Inc., 210 F.2d 939 (5th Cir. 1954) 29

City of Round Rock v. Smith, 687 S.W.2d 300 (Tex. 1985) 29

City of St. Louis v. Praprotnik, 108 S.Ct. 915, 923 (1988) ..... i, 9, 12, 14 ..... 27, 30, 31, 32

City of Wichita Falls v. Lewis, 68 S.W.2d 288, (Tex. Civ. App. - Fort Worth 1934, writ dism'd) 29

Contrelli Trust v. City of McAllen, 465 S.W.2d 804 (Tex 1971) 29

Corfield v. Coryell, 4 Wash. C.C. 371, 6 Fed. Cas. 546 (1823) 19

Corpus Christi Independent School Dist. v. Padilla, 709 S.W.2d 700 (Tex. App. - Corpus Christi 1986, no writ) 32

Crow v. City of San Antonio, 294 S.W.2d 899 (Tex. Civ. App. - San Antonio 1956, no writ) 29

Dilley v. City of Houston, 148 Tex. 191, 222 S.W.2d 992 (1949) 29

District of Columbia v. Carter, 409 U.S. 418, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973) 21

Fielder v. Casey, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988) 29

General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982) 20

Great American Federal Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979) 18

Griffin v. Breckenridge, 403 U.S. 88, 104 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971) 24

Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) 21

Cases — Page

Imbler v. Patchman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) 26

James v. Bowman, 190 U.S. 127, 23 S.Ct. 678, 47 L.Ed. 979 (1903) 24

Johnson v. Railway Express Agency, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) 27, 28

Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed2d 1189 (1968) ..... 15, 16, 19 ..... 23, 25, 26, 27, 29

Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972) 17, 18, 20

Mitchum v. Foster, 407 U.S. 225, 91 S.Ct. 2151, 32 L.Ed.2d 705 (1972) 30

Monell v. Dept. of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978) ..... 8, 9, 12, 14 ..... 19, 22, 26, 28, 30

Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) 11, 15, 28, 30

Moore v. County of Alameda, 412 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973) 28

N.C.A.A. v. Tarkanian, 109 S.Ct. 454 (1988) 14

Occidental Life Ins. Co. v. E.E.O.C., 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977) 29

Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) 26, 30

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) 30

Patterson v. McLean Credit Union, 108 S.Ct. 419 (1988), *per curiam* 14

Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) 30

Pembaur v. City of Cincinnati, *106 S.Ct. 1292*, 89 L.Ed.2d 452 (1986) ..... 9, 10, 13 ..... 14, 31, 33

Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) 26

Cases — Page

Posadas v. National City Bank, 296 U.S. 497, 56 S.Ct. 349, 80 L.Ed. 351 (1936) 15

Robertson v. Wegmann, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978) 29, 30

Runyon v. McCrary, 427 U.S. 160 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) 14, 23, 27

Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1971) 18

Sarmiento v. City of Corpus Christi, 465 S.W.2d 813 (Tex. Civ. App. - Corpus Christi 1971, no writ) 29

Scheurer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1690, 40 L.Ed.2d 90 (1974) 26

Schroggins v. City of Harlingen, 131 Tex. 237, 112 S.W.2d 1035 (1938) 29

Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495, 162 A.L.R. 1330 (1945) 22

Slaughter-House Cases, 16 Wall 1136, 83 U.S. 36, 21 L.Ed. 394 (1872) 21, 30

Sullivan v. Little Hunting Park, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969) 27

Tenny v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951) 26

United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941) 14, 17

United States v. Gradwell, 243 U.S. 476, 37 S.Ct. 407, 61 L.Ed. 857 (1917) 17

United States v. Henderson, 78 U.S. 652, 11 Wall 652, 206 L.Ed.2d 235 (1870) 15

United States v. Morris, 125 F. 322 (E.D. Ark. 1903) 19

United States v. Mosley, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1915) 16, 17

United States v. Price, 393 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1960) 14, 25, 26

Cases — Page

United States v. Reese, 92 U.S. 214, 2 Otto, 23 L.Ed. 563 (1875) 25

United States v. Williams, 341 U.S. 70, 71 S.Ct. 581, 95 L.Ed. 758 (1951) 16, 22, 24

Waters v. Wisconsin Steel Works of International Harvester Company, 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970) 18

Williams v. Butler, No. 83-2534, No. 83-2641 1988 WL 135650 (8th Cir., filed Dec. 21, 1988) (en banc) 13

Wilson v. Garcia, 471 U.S. 260, 105 S.Ct. 1938, 85 L.Ed.2d 2545 (1985) 29

Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) 26

CONSTITUTIONAL PROVISIONS

U.S. Constitution

14th Amendment 15, 25, 30

15th Amendment 24, 25

STATUTES

United States Code

18 U.S.C.

§ 241 ..... 16, 24

§ 242 22

28 U.S.C.

§ 1331 17

§ 1343 (3) 17, 18

42 U.S.C.

§ 1981 ..... 6, 7, 8, 11, 14, 15, 18, 21, 26, 27, 28, 29, 30, 31

§ 1982 ..... 15, 23, 27

§ 1983 ..... 6, 7, 8, 11, 12
..... 14, 15, 17, 18, 21, 22, 26, 30, 31
§ 1986 11
§ 1988 ..... 9, 27

Revised Statutes

§ 5506 ..... 17, 23, 24
§ 5507 ..... 23, 24, 25
§ 5508 ..... 16, 17, 23

Statutes

Civil Rights Act of April 9, 1866
(c. 31, 14 Stat 27) 7, 8, 14, 15
..... 16, 19, 20, 21, 22, 23, 24, 25, 27

Civil Rights Act of May 31, 1870
(c. 114, 16 Stat 140) 14, 15, 16, 17
..... 23, 24, 25

Civil Rights Act of April 20, 1871
(c. 114, 17 Stat 13) 7, 11, 12, 15
..... 17, 18, 19, 20, 21

Texas Education Code

§ 13.351 32
§ 23.26 32

CONGRESSIONAL GLOBE, 39TH CONG.,
1ST SESS 19, 20

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

No. 87-2084
No. 88-214

NORMAN JETT,

Petitioner,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

OPINIONS BELOW

The initial Court of Appeals opinion is reported at 798 F.2d 748, and is reprinted in the Appendix to the Petition for Writ of Certiorari ("Pet. App."), at 1A-32A. The Fifth Circuit's order on rehearing, supplementing its initial opinion, is reported at 837 F.2d 1244, and is reprinted at Pet. App. 33A-44A. The opinion of the United States District Court for the Northern District of Texas, Dallas Division, is unreported and is printed at Pet. App. 45A-63A.

JURISDICTION

The Fifth Circuit entered its judgment on August 27, 1986, and issued its mandate on February 5, 1988. Pet. App. 66A-67A. Norman Jett timely filed his petition for writ of certiorari on June 21, 1988, and the Dallas Independent School District timely filed its cross-petition on July 21, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The following statutes and constitutional provisions are involved in this case:

United States Constitution
- Thirteenth Amendment
- Fourteenth Amendment (Sections 1 and 5)
- Fifteenth Amendment

United States Code
18 U.S.C. § 241; 18 U.S.C. § 242; 28 U.S.C. § 1331; 28 U.S.C. § 1343; 42 U.S.C § 1981; 42 U.S.C. § 1983; 42 U.S.C. § 1988;

Revised Statutes (1874)
Sections 5506, 5507 and 5508

Statutes
Civil Rights Act of April 9, 1866 (c. 31, 14 Stat. 27), the "Civil Rights Act of 1866."

Civil Rights Act of May 31, 1870 (c. 114, 16 Stat. 140), the "Enforcement Act of 1870."

Civil Rights Act of April 20, 1871 (c. 114, 17 Stat. 13), the "Ku Klux Klan Act of 1871."

The above-cited constitutional provisions and statutes are reprinted in full in the Joint Appendix (hereafter "Jt. App.").

STATEMENT

Background

Norman Jett became an employee of the Dallas Independent School District ("DISD") in 1957. In 1962 he became a teacher and assistant football coach at South Oak Cliff High School. In 1970 he became head coach and athletic director, while retaining his teaching position. During this period the racial composition of the school was changing from predominantly white to predominantly black. By 1982, when the events that gave rise to this litigation arose, the South Oak Cliff student body was virtually all black, and Jett was the only white coach.

Jett apparently served well as a teacher. He was regularly evaluated and his marks were uniformly high. Tr. 203-205, 264-266. It was as a football coach, however, that he distinguished himself. During his thirteen years as head coach, Jett's South Oak Cliff teams won over eighty percent of their games and became the dominant high school team in Dallas. Two hundred fifty of his players won college scholarships and forty three of them went on to play professional football. Tr. 220-221, 223-224.

What proved to be Jett's last game occurred in the late fall of 1982, when his team lost a playoff game to Plano High School before a large turnout in the Cotton Bowl. The loss was a bitter one, and it deeply affected Frederick Todd, who had served as South Oak Cliff principal since 1975.

Despite the team's great success, Todd had not been totally satisfied with Jett. On several occasions Todd had urged Jett to recruit promising middle school athletes, but the practice was forbidden by DISD regulations, and Jett had refused. Jett's comments to the local newspapers — that many of his players could not meet new academic standards for college athletes — also rankled Todd.

Todd recommends Jett's removal

Immediately following the Plano loss, Todd criticized Jett for failing to follow the "game plan." He also quizzed Jett about an absurd rumor that Jett had been bribed to "throw the game." Soon afterward he gave Jett an unsatisfactory teacher evaluation, the first in Jett's twenty-six years with

DISD. On March 15, 1983, Todd summoned Jett to his office and told him that he was recommending his removal as athletic director/head coach.

Two days later Todd sent a letter to John Kincaide, DISD athletic director, formally recommending that Jett be removed as athletic director/head coach. Todd's purported reasons, as set forth in this letter and in his testimony, were Jett's "improper" comments to the newspapers, his failure to recruit junior high school athletes, and his failure to follow the "game plan" in the Plano game. Tr. 77-79, 86-90, 100-108, 174-175, 204, 207.

The jury would later find that Todd was motivated by Jett's race and by Jett's exercise of First Amendment rights, and that the stated reasons were pretextual. Jt. App. 36-38, 42-44. These findings were upheld by the Fifth Circuit and are no longer in dispute. Pet.App. 14A-20A.

DISD policies and practices

Under DISD practices Jett's removal as athletic director/head coach was treated as a "reassignment". No loss in salary was contemplated. And, while the DISD Board of Trustees had approved written policies to deal with *teacher* reassignments, it had promulgated none concerning reassignment of coaches and athletic directors. Jt. Ap. 65-66.

DISD Superintendent Linus Wright described transfers of athletic directors and coaches as occupying a "gray area," where matters were left up to him and his subordinates, and Wright had instituted "practices" to deal with such transfers. Jt. App. 68, 70. He could appoint a panel to hear the matter and make a recommendation, or there could be an informal hearing before him. Jt. App. 69. In either event Wright made the final ruling, and there was no appeal from his decision to transfer an athletic director or coach. Jt. App. 65, 69-70.

Superintendent Wright upholds Todd's decision

Following the March 15 meeting with Todd, Jett met with Kincaide. Tr. 21. Kincaide told Jett that, since he had received nothing in writing, he should return to the school However, as Jett was leaving Kincaide's office, he met

another administrator, who sent him to meet with John Santillo, DISD personnel director. After hearing Jett's story, Santillo told Jett that the damage was done and that he should allow himself to be removed from South Oak Cliff. When Jett protested, Santillo took him to meet with Wright. Tr. 271-275.

During this meeting, Jett told Wright and Santillo that he believed that Todd's recommendation was racially motivated. Jt. App. 71-72, 76. Wright's response was to suggest that Jett consider leaving the school, since he and Todd were having difficulty. Wright said that he had every confidence in Jett and that he would find him another position. Jt. App. 71-72.

On March 25, 1983, Wright convened a meeting with Santillo, Kincaide, Todd, and two other administrators. Jett was not invited since, according to Wright, the informal March 15 meeting had constituted the hearing required by Wright's transfer policy. Tr. 405. At the end of the meeting Wright officially ordered Jett removed as athletic/director coach. Jt. App. 72-73, 77.

The jury found that Wright's decision was "based wholly on Todd's recommendation without any independent investigation." Jt. App. 41, 46. Although there is evidence that Wright ordered Kincaide to investigate Jett's allegations, Kincaide apparently did not do this, once he learned that Jett had met with Wright and Santillo. Tr. 620, 627. Santillo testified that no investigation was in fact conducted. Jt. App. 77.

There was evidence from which the jury could conclude that Wright simply resolved the conflict in favor of the principal and that he made no attempt to decide if there was any truth to the allegation of racial discrimination. Jt. App. 68.

The Aftermath

Jett was reassigned to the Business Magnet High School because, he was told, it was the only position available. Tr. 279-280. Jett was undergoing a great deal of emotional stress, and the Business Magnet principal suggested that Jett take some time off. Tr. 291-292. When Santillo learned of this, he sent a letter to Jett expressing "disappointment" at Jett's attendance. Tr. 292-293.

When Jett received the letter, he went to Santillo, who

again took him to Wright. This time Wright told Jett that he would be "considered" for any head coaching positions that might come open. Tr. 293-294, 437-438.

On May 5, 1983, Santillo wrote Jett a letter and told him he was being placed on the "unassigned personnel" budget and that he had been assigned to the security department. While Jett should not expect to be able to remain in the department next year, Santillo said, Jett could "pursue" any available position for which he was certified. Further, if Jett was not recommended for a coaching position, he would be assigned as a classroom teacher. Jett decided that Wright did not intend to keep his promise to give him the next available head coaching job, and filed suit. Tr. 359, 371-372.

Subsequently, a head coaching job did open up at Madison High School; however, Jett was not contacted regarding that position, apparently because he had filed suit. Tr. 317-319, 452, 621-622.

On or about August 4, 1983, Jett received notice that he had been assigned to Thomas Jefferson High School as freshman football/track coach. Tr. 305-306. Jett resigned rather than accept this humiliating demotion. Tr. 307-311.

The remaining issues

Jett claimed several civil rights violations, only three of which are still before the Court.[1] First he alleged that the decision to transfer him because of his newspaper statements violated his First Amendment rights, and gave rise to a cause of action under 42 U.S.C. § 1983. Next he claimed that the decision to transfer him because he was white violated his Fourteenth Amendment equal protection right, again giving rise to a Section 1983 claim. With regard to the racially motivated transfer, Jett also claimed a violation of 42 U.S.C. § 1981.

Todd's liability under all three theories has been established. At issue here is only the liability of DISD.

[1] See Pet. App. 7-8 for the disposition of the other claims.

SUMMARY OF ARGUMENT

We answer the first question by determining Congressional intent. The Fifth Circuit approached the problem from the wrong direction. It sought the intent of the Congress which enacted Section 1983. Instead it should have sought the intent of the Congress which passed Section 1981.

The forerunner of Section 1983 was passed by the 42nd Congress in § 1 of the Ku Klux Klan Act of 1871. Section 1981, on the other hand, was enacted by an earlier Congress. The Fifth Circuit apparently reasoned that, by passing Section 1983, the 42nd Congress had somehow amended the earlier statute to impose Section 1983's "policy or custom" requirement onto that statute as well.

This reasoning quickly encounters difficulty. Congress normally amends an existing statute by express act. Absent this, amendment can only occur through a process analogous to "repeal by implication." Such repeals are not favored, and this is especially so where Reconstruction era civil rights statutes are involved. In our case there is no clear expression that the 42nd Congress intended to impose a "policy or custom" requirement on the already existing statute. On the contrary, there is strong indication that Congress intended for the two statutes to apply differently.

Section 1981 originated as § 1 of the 1866 Civil Rights Act, and the 1866 Congressional debates indicate that Congress passed this statute to secure a set of specific rights to the newly freed slaves. These rights were enumerated in the statute and, in the legal thinking of the day, were seen as "fundamental" or "natural" rights.

When the 1871 Congress drafted Section 1983, it modeled it after § 2 of the 1866 Act. It made an important change in wording, however. Instead of the specific list of "fundamental rights" secured by the 1866 statute, Section 1983 secured "any rights, privileges, or immunities secured by the Constitution." Ultimately this language was held not to cover the "fundamental rights" protected by the 1866 Act. Thus the 1871 Congress did not intend to amend Section 1981.

The proper way to construe Section 1981 is by reading the history and language of that statute, not Section 1983.

In other words, we must ask how Section 1981 would be construed if Section 1983 had never been passed.

First, however, we must know exactly what to look for. The question again is this: Does Section 1981 contain a "policy or custom" requirement? To answer this, we must first recall just how the *Monell* Court went about finding a "policy or custom" requirement in Section 1983. A review of *Monell* reveals that the Court derived the "policy or custom" requirement entirely from certain "crucial terms" of Section 1983.

These "crucial terms" provide an avenue of inquiry into the 1866 Civil Rights Act. In fact the "crucial terms" of Section 1983 come directly from § 2 of the 1866 Act. Does that mean that Congress intended to include a "policy or custom" requirement in § 2 of the 1866 Act? Probably not. Section 2 was a criminal statute, and because of this it's unlikely that Congress had a "policy or custom" requirement in mind in 1866.

Yet, even if we assume that § 2 of the 1866 Act somehow does embody a "policy or custom" requirement, that doesn't mean that a similar requirement appears in § 1.

Of course, the language of § 1 is totally different from § 2, and Section 1981 comes from § 1 of the 1866 Act, not § 2. Moreover, the "crucial terms" in § 2 are highly restrictive. Because this restrictive language was not placed in § 1, nor in any other part of the 1866 Act aside from § 2, it follows that Congress did not intend to impose the language-specific "policy or custom" requirement on § 1, and hence on the modern Section 1981.

Once we conclude Congress did not intend to impose a "policy or custom" requirement on Section 1981, we turn to the task of determining just what Congress did intend. As it turns out, there is no clear indication of Congressional intent that pertains to our problem. Under these circumstances there are two routes we can take. Both lead to the same place.

The first alternative is to read Section 1981 in the light of the common law principles that were widely known in 1866. This is the approach that the Court took in the Section 1983 immunity cases. The prevalent legal doctrine in the middle of the 19th Century turns out to be *respondeat superior*.

The second approach is to follow 42 U.S.C. § 1988, and either adopt the rule of the state in which the suit was filed or fashion a single federal rule. The applicable state law is Texas law, and there the doctrine of *respondeat superior* is strong. On the other hand, if the Court fashions a single federal rule, then general common law concepts must again be called upon, and again we wind up with *respondeat superior*.

In making its choice the Court is permitted to consider the policies behind the civil rights statutes. Certainly the policies of eliminating racial discrimination discouraging official misconduct, and compensating civil rights deprivations are well established. There are, however, other factors which the Court should also consider.

First, the Court's decade of struggle with *Monell's* "policy or custom" requirement should illustrate the need for a simple, widely understood standard. Again the rule of *respondeat superior* fits better than any other.

Second, recognition of a *respondeat superior* standard will not lead to an expansion of liability under Section 1981, such as occurred with Section 1983. Section 1983 has grown because of its broad language, which can arguably encompass almost any kind of government activity. Section 1981 has different language, however. It secures a narrow set of enumerated rights, and there is no danger that the scope of Section 1981 liability will become unmanageable.

Finally, we turn to the second Question Presented. As framed, the Question answers itself at least insofar as Section 1983 is concerned. Obviously we can't satisfy the "policy or custom" requirement unless Wright was a policymaker with regard to transfers of coaches. That's exactly what *Pembaur* says but, then again, that's exactly what the Fifth Circuit said in our case.

Analyzing the facts of our case in the light of *Pembaur* and *Praprotnik*, we ask first where applicable state law places the policymaking role. Our inquiry is necessarily brief. Texas statutes don't say whether school district superintendents can or cannot make policy. Nor does our record contain any direct evidence as to whether the DISD school board actually made such a delegation to Superinten-

dent Wright, although that fact can be inferred. The lack of direct evidence comes as no surprise, since the case was tried before *Pembaur*. Obviously, this part of the case must be retried, hopefully after further clarification of the "policy or custom" requirement.

ARGUMENT

I. A local government employee who claims job discrimination on the basis of race need not show that the discrimination resulted from official "policy or custom" to recover from the employer under 42 U.S.C. § 1981.

A. The "policy or custom" requirement arose from the language of 42 U.S.C. § 1983.

1. Background

In *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), the Court held that Chicago police officers acted under "color of law" when they invaded and ransacked a home without a search warrant. They were therefore liable under 42 U.S.C. § 1983. 365 U.S., at 171-187. Their municipal employer, however, was not liable, since Congress did not intend to include municipalities among the "persons" liable under Section 1983. 365 U.S., at 187-192.

Both *Monroe* holdings were based on the Court's reading of Congressional intent. Section 1983 "came onto the books as section 1 of the Ku Klux Act of April 20, 1871. 17 Stat 13," 365 U.S., at 171, and the Court relied on the 1871 Congressional debates to support its holding that policemen could act under "color of law", even though their actions might be contrary to the "ordinances or regulations" of their municipal employer. 365 U.S., at 171-183.

The *Monroe* court also examined the 1871 debates with regard to its second holding, i.e., that the City of Chicago was not a "person" liable under § 1983. There the Court focused on the debates over § 6 of the 1871 statute[2] rather than § 1. At issue was the amendment proposed by Representative Sherman which would have imposed liability upon "the county, city, or parish" in which certain violent acts occurred. 365 U.S., at 189 n. 41. The Sherman Amendment was defeated, and the *Monroe* Court concluded that

[2]Now 42 U.S.C. § 1986.

Congress' response to the proposed measure "was so antagonistic that we cannot believe" that Congress intended to include municipalities among the "persons" liable under §1 of the Act. 365 U.S., at 191.

Seventeen years later in *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978), the Court re-examined the Sherman Amendment debates and concluded that it had misread them in *Monroe*. "Congress *did* intend for municipalities and other local government units to be included among those persons to whom § 1983 applies." 436 U.S., at 690 (emphasis in original).

2. Origin of the "policy or custom" requirement

In Part II of *Monell* the Court began to define the newly recognized governmental liability. First it held that "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." 436 U.S., at 691. It then formulated the standard by which local governments could be held liable—the now familiar "policy or custom" requirement. *Id.*, at 694-695. The Sherman Amendment debates, crucial to Part I of *Monell*, were called upon only once in Part II, to bolster the rejection of *respondeat superior*. 436 U.S. at 691 n. 57. They played no role in formulating the "policy or custom" requirement. Instead, throughout Part II of *Monell*, the Court relied exclusively on "the language of § 1983 as originally passed," i.e., § 1 of the Ku Klux Klan Act of 1871, which read as follows:

> *[A]ny person who*, under color of any law, statute, ordinance, regulation, custom, or usage of any State, *shall subject, or cause to be subjected* . . .

436 U.S., at 691 (emphasis the Court's). The Court wrote that this language "imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights." 436 U.S., at 692.

In *City of St. Louis v. Praprotnik*, 108 S.Ct. 915, (1988), the Court again emphasized this language. There it wrote that "the crucial terms of the statute are those that provide for liability when a government 'subjects [a person], or causes [that person] to be subjected,' to a deprivation of constitutional rights." 108 S.Ct., at 923 (plurality). Thus, the

Court has twice emphasized the phrase "subject or cause to be subjected" and, understandably, this has led lower courts to focus on this phrase as the source of the "policy or custom" requirement. *See, e.g., Williams v. Butler*, No. 83-2534, No. 83-2641, 1988 WL 135650 (8th Cir., filed Dec. 21, 1988) (en banc).[3] Yet the Court has never said that this language alone comprises the "crucial terms" giving rise to the policy or custom requirement and, upon examination, it appears that the phrase "color of law, statute, ordinance, regulation, custom, or usage" also plays a role.

Apparently the Court reads section 1983 quite literally. The "person" is the local government; the phrase "under color of any law, statute, ordinance, regulation, custom or usage" means pursuant to "policy or custom"; and the phrase "subject or cause to be subjected" requires a causal relationship between this "policy or custom" on the one hand and the constitutional deprivation on the other. *Cf. City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818, 105 S.Ct. 2427, 2433 (1985) ("This language tracks the language of the statute."), and *Pembaur v. City of Cincinnati*, 106 S.Ct. 1292, 1299, n. 10, 89 L.Ed. 2d 452 (1986).

Thus the phrase "under color of any law, statute, ordinance, regulation, custom or usage" is, if anything, more "crucial" to the "policy or custom" requirement than the "subject or cause to be subjected" language. Unfortunately, this "color of law" language has been given other meanings

---

[3] *On remand from, City of Little Rock v. Williams*, 108 S. Ct. 1102 (1988), *vacating, Williams v. Butler*, 802 F.2d 296 (8th Cir. 1986) (en banc), *on remand from, City of Little Rock v. Williams*, 475 U.S. 1105, 106 S.Ct. 1508, 89 L.Ed.2d 909 (1986), *vacating, Williams v. Butler*, 762 F.2d 73 (8th Cir. 1985) (en banc), *aff'g*, 746 F.2d 431 (8th Cir. 1984).

in other contexts.[4] This may be why the Court coined the phrase "policy or custom", as opposed to quoting the actual language of the statute.[5] This perhaps may also be why, when discussing the actual language of the statute, the Court has emphasized the phrase "subject or cause to be subjected."

B. Section 1983 did not amend Section 1981

1. Section 1981 was not passed by the 42nd Congress, but by an earlier Congress

In *Runyon v. McCrary*, 427 U.S. 160, 168, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), the Court held that Section 1981 originated as § 1 of the Civil Rights Act of April 9, 1866, c. 31, 14 Stat 27. The *Runyon* dissent, however, argued that Section 1981 originated with § 16 of the Enforcement Act of May 31, 1870, c. 114, 16 Stat 144. 427 U.S., at 195 (White, J., dissenting). While the court is presently reconsidering *Runyon*,[6] the final resolution of that controversy can make no difference here. Regardless of whether Section 1981

[4] In Section 1983 cases the phrase "color of any law, statute, ordinance, regulation, custom, or usage" "has consistently been treated as the same thing as state action required by the Fourteenth Amendment." *United States v. Price*, 393 U.S. 787, 794 n. 7, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1960). *See also, N.C.A.A. v. Tarkanian*, 109 S.Ct. 454, n.4 (1988), and cases there cited. *Cf. Adickes v. S. H. Kress Co.*, 398 U.S. 144, 166-167, 90 S.Ct. 1598, 2 L.Ed. 142 (1970). Compare these cases with *Monroe*, where it was argued that the Chicago policemen could not have acted under "color of law" since their actions in invading and ransacking the home were contrary to local law. 365 U.S., at 172. The Court rejected this argument, holding that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of state law.' " 365 U.S., at 184, quoting *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). Thus, because the Chicago policemen misused the power given them by state law, they acted "under color of law." Yet, under *Monell* these same policemen, almost certainly, would not have been acting pursuant to their employer's "policy or custom." *Cf. Praprotnik*, 108 S.Ct., at 946 n. 19 (Stevens, J., dissenting).

[5] *Cf. Pembaur*, 106 S.Ct., at 1302 n.1 (Stevens, J., concurring).

[6] *See Patterson v. McLean Credit Union*, 108 S.Ct. 1419 (1988), *per curiam*.

originated with the 39th Congress in 1866, or with the 41st Congress in 1870, the fact remains that, when the 42nd Congress passed the Ku Klux Klan Act in 1871, Section 1981 was already, to use the words of *Monroe*, "on the books."

2. Absent clear historical evidence, one cannot conclude that, by passing Section 1983, Congress imposed a "policy or custom" requirement on Section 1981.

In our case, the Court of Appeals reasoned that "in 1871 when Congress enacted what is now codified as section 1983, which was five years after it had enacted the statute that became section 1981, Congress did not intend municipalities to be held liable for constitutional torts committed by its employees in the absence of official municipal policy." 798 F.2d, at 762, Pet. App. 29A. Apparently the Fifth Circuit concluded that, when Congress passed the Ku Klux Klan Act in 1871, it intended to modify Section 1981 by imposing a "policy or custom" requirement on the already existing statute. Since Section 1981 was already "on the books" this argument raises all the difficult problems of "repeal by implication." Generally "repeals by implication are not favored,"[7] and the Court has uniformly rejected them in other cases involving Reconstruction era civil rights statutes.

In *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), the Court considered whether 42 U.S.C. § 1982, which prohibits discrimination in the sale of housing, applies to private parties. Section 1982 originated with § 1 of the Civil Rights Act of 1866, c. 31, 14 Stat 27, and it was re-enacted four years later by § 18 of the Enforcement Act of May 31, 1870, c. 114, 16 Stat 141. 392 U.S., at 423. In the interval between the two statutes, the States ratified the 14th Amendment which is, of course, limited to "state action." It was argued in *Jones* that, by re-enacting the 1866 Act as part of the 1870 Act, Congress

[7] *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 80 L.Ed. 351 (1936); *United States v. Henderson*, 78 U.S. 652, 565-658, 11 Wall 652, 20 L.Ed.2d 235 (1870); and annotation at 4 L.R.A. 308.

meant to incorporate a "state action" requirement into the statute . 392 U.S., at 436. The Court rejected this argument. Citing the absence of historical support, the Court refused to conclude "that Congress made a silent decision in 1870 to exempt private discrimination from the operation of the Civil Rights Act of 1866." 392 U.S., at 437.

In *United States v. Mosley*, 238 U.S. 383, 386-387, 35 S.Ct. 904, 59 L.Ed. 1355 (1915), two Oklahoma election judges were charged with conspiring not to count votes in a Congressional election. The charge was brought under § 6 of the Act of May 31, 1870, which made it a crime for two or more persons to conspire "to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States."[8]

Here, unlike *Jones*, there was abundant historical evidence that Congress *had* intended to repeal § 6 of the 1870 Act, at least insofar as it applied to voting. In 1894 Congress had passed "An Act to repeal all statutes relating to supervisors of elections. . ." 28 Stat. at L. 36, ch. 25, Comp. Stat 1913, § 1015. At one stroke it systematically repealed every federal statute which expressly dealt with voting. The list of repealed statutes included § 4 of the 1870 Act, which made it a crime to use "force, bribery, threats, intimidation, or other unlawful means [to] hinder, delay, prevent, or obstruct ... any citizen" from voting or qualifying to

[8] 16 Stat 141, § 6, later R. S. § 5508. By the time of *Mosley* this section had become § 19 of the Criminal Code of March 4, 1909, c. 321, 35 Stat. at L. 1092. It's now 18 U.S.C. § 241. *See, generally, United States v. Williams*, 341 U.S. 70, 83, 71 S.Ct. 581, 95 L.Ed. 758 (1951).

vote.[9] *See Mosley*, 238 U.S. at 389 (Lamar, J., dissenting); *United States v. Gradwell*, 243 U.S. 476, 483-484, 37 S.Ct. 407, 61 L.Ed. 857 (1917); and *United States v. Classic*, 313 U.S. 299, 334-335, 61 S.Ct. 1031, 85 L.Ed. 1368 (1940). Moreover, the 1894 Congressional debates reflected a clear intent to exclude all aspects of voting from the protection of the civil rights laws. 238 U.S., at 390-391. Despite this manifestation of legislative intent, the *Mosley* Court concluded that § 6 had not been repealed or narrowed by the 1894 statute. It thus permitted the election judges to be prosecuted.

As a final example, we turn to *Lynch v. Household Finance Corp.*, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972), where the Court considered the history of 28 U.S.C. § 1343(3), the "jurisdictional counterpart" of § 1983. 405 U.S., at 543. That statute gives federal courts jurisdiction over "any civil action" to redress a deprivation of civil rights, and it contains no amount-in-controversy requirement. *See, generally, Lynch*, 405 U.S., at 543 n. 7, and *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 607, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979). In 1875 Congress passed the forerunner of 28 U.S.C. § 1331 which, for the first time, gave federal courts general jurisdiction over all civil suits "arising under the Constitution and laws of the United States." 405 U.S. at 546. That statute originally imposed a minimum jurisdictional limit of $500, which was periodically increased until it had reached $10,000 at the time of *Lynch*. 405 U.S., at 546 n. 12.[10]

Early cases construed these statutes by distinguishing between "personal rights" and "property rights". Suits to redress deprivations of "personal rights" were covered by the 1871 Ku Klux Klan Act . Actions involving "property rights", on the other hand, were deemed to arise under the

[9] In the Revised Statutes, §§ 4 and 6 of the 1870 Act were placed in Title 70, Chapter Seven, entitled "Crimes Against the Elective Franchise and Civil Rights of Citizens." Thus, § 4 of the 1870 statute became R.S. § 5506, while § 6 became R.S. § 5508. See Revisor's Notes to ch. 7 of Revised Statutes.

[10] The amount in controversy requirement was deleted in 1980. Pub. L. 96-486, § 2 (a), 94 Stat 2349.

1875 federal question statute, and thus had to meet its amount-in-controvesy requirement. 405 U.S., at 546-547. The *Lynch* Court overruled these cases. The two statutes were independent, and the 1871 statute covered suits to redress deprivations of "any rights, privileges, or immunities secured by the Constitution," including "property rights." To hold otherwise, one would have to reason that, when it enacted the 1875 statute, Congress "intended to narrow the scope of a provision passed four years earlier as part of major civil rights legislation." 405 U.S., at 548. The Court, citing the prohibition against repeals by implication, "refus[ed] to pare down § 1343(3) jurisdiction." 405 U.S., at 549.

Finally, the Court has generally refused to conclude that modern civil rights statutes have narrowed the scope of the Reconstruction era statutes. *See, Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 377, 99 S.Ct. 2345, 2351, 60 L.Ed.2d 957 (1979), and *Id.*, 442 U.S., at 391 (White, J., dissenting). *See also, Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097, 1100 (5th Cir. 1971), and *Waters v. Wisconsin Steel Works of International Harvestor Company*, 427 F.2d 476, 484 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970).

These principles apply to our case. We cannot assume that the 42nd Congress made a silent decision to impose a "policy or custom" requirement onto Section 1981 when it enacted Section 1983. To conclude that Section 1983 somehow amended Section 1981, we must have clear historical evidence. The historical evidence that does exist, however, points in the opposite direction.

3. Congress did not intend for Section 1983 to amend Section 1981.

The Fifth Circuit concluded in our case that "Congress did not intend to impose different types of liability on a municipality based on the particular 'federal' wrong asserted." Pet. App. 29A. However, even if that were so it would not justify a repeal by implication which, as we have seen, requires strong evidence of an *affirmative* intent to repeal. Even so, the Fifth Circuit's reading of Congressional intent is probably wrong. There's evidence that the rights

secured by the 1866 Act were viewed quite differently from the rights secured by the 1871 Act and that the two statutes were passed to meet different needs. And while the views involved may not have survived as viable legal theories, they do reveal the intent of those that held them. *Cf. Monell*, 436 U.S., at 676.

As the 1866 debates make clear, the Civil Rights Act of 1866 was intended to secure certain *specific* rights to the newly freed slaves. Cong. Globe, 39th Cong., 1st Sess., 41 (remarks of Rep. Sherman), 474-475 (Sen. Trumbull), 504 (Sen. Howard). These rights were regarded as "fundamental" or "inalienable" or "natural". *Id.*, 474-475 (Sen. Trumbull), 1118-1119 (Rep. Wilson). The idea had been discussed by Justice Washington, on circuit, in *Corfield v. Coryell*, 4 Wash. C.C. 371, 6 Fed. Cas. 546, 551-552 (1823), and Senator Trumbull read from that opinion on the Senate floor. Cong. Globe, 39th Cong., 1st Sess., 475. *See, generally, United States v. Morris*, 125 F. 322, 325-326 (E.D. Ark. 1903), and cases there cited. *See also, Jones*, 392 U.S., at 441, 465, 466.

Section 1 of the statute, as originally introduced, read as follows:

> There shall be no *discrimination in civil rights or immunities* among the inhabitants of any State or Territory of the United States on account of race, color or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as punishment for crime . . . shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of persons and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding.

Cong. Globe, 39th Cong., 1st sess., 211 (emphasis added). During the ensuing debate questions were raised concerning the scope of the phrase "civil rights and immunities." The Act's proponents insisted that this language referred

to "fundamental rights." Opponents, however, feared it might also encompass "political rights", including the right to vote.

Thus, after Sen. Trumbull had equated "civil rights and immunities" with "fundamental rights", *Id.*, 474-475, the following exchange took place:

> MR. McDOUGALL: . . . Do I understand that it is not designed to involve the question of political rights?
>
> MR. TRUMBULL: This bill has nothing to do with the political rights or status of parties. It is confined exclusively to their civil rights such as appertain to every free man.

Id., 476. Opponents were not convinced by Senator Trumbull's assurances, however. Senator Saulsbury drew the distinction between "rights which we derive from nature" and "rights which we derive from government." *Id.*, 477. He went on to note that "[t]he right to vote is not a natural right." *Id.*, 478. He then read the "civil rights and immunities" language and remarked that "the question is not what [Sen. Trumbull] means but what the courts will say the law means." *Id.*, 478. *See also, Id.*, 1117, 1151.

Eventually there was a compromise. On the eve of final passage, the bill was amended to delete the reference to "civil rights or immunities". *Id.*, 1367-1368. *See also, General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 388 n. 15, 102 S.Ct. 3141, 3149, 73 L.Ed.2d 835 (1982). This left § 1 as protecting a specific list of enumerated rights, which Congress viewed as "natural rights."

Five years later, when Congress drafted § 1 of the Ku Klux Klan Act, it modeled it after § 2 of the 1866 Act,[11] which read as follows:

> That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject or cause to be subjected, any inhabitant of any State or Territory to the deprivation of *any right secured by this act* . . . shall be deemed guilty of a misdemeanor . . .

[11] *See Lynch*, 405 U.S., at 545.

c. 114, 14 Stat 27, § 2 (emphasis added). The "rights secured by this act" were obviously the "natural rights" enumerated in § 1. The 1871 Congress, however, deleted that language and substituted the phrase "any rights, privileges, or immunities secured by the Constitution."

While there was controversy as to what these words meant, their meaning was ultimately decided, to quote Senator Saulsbury, by "what the Courts will say." In the *Slaughter-House Cases*, 83 U.S. 36, 75-80, 16 Wall 1136, 21 L.Ed. 394 (1872), the Court construed the Fourteenth Amendment's "privileges and immunities" clause to include only those rights which arose or grew out of the citizen's relationship with the national government. The Court expressly rejected the argument that "privileges and immunities" includes "natural rights," 83 U.S. at 75-76, and this same construction was later given the "rights, privileges, and immunities" language of § 1983. *See Hague v. C.I.O.*, 307 U.S. 496, 511, 59 S.Ct. 954, 83 L.Ed. 1423 (1939), and 307 U.S., at 520 (Stone, J., concurring).

Thus, we can conclude that Congress did not intend, by enacting § 1 of the Ku Klux Klan Act, to secure the same rights secured by the 1866 Act. *See, generally, District of Columbia v. Carter*, 409 U.S. 418, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973), and cases cited at our Petition, p.15.

C. The history and language of Section 1981 show that Congress did not intend to include a "policy or custom" requirement in that statute.

To construe Section 1981, we must look to the history and language of that statute, not Section 1983. Unfortunately, the legislative debates are not helpful. Thus, we turn to the other guidepost in this difficult area, statutory language.

We know that the *Monell* Court relied exclusively on the language of Section 1983 to derive the "policy or custom" requirement. See Part IA2 above. We also know that Section 1983 was modeled after § 2 of the 1866 Act. See part IB3. This hints that § 2 of the 1866 Act might itself contain a "policy or custom" requirement. This possibility deserves examiniation, since Section 1981 originated in the preceding section (§ 1) of that same 1866 Act.

Again, we examine the specific language of § 2 of the 1866 Act:

> That any person who, *under color of any law, statute, ordinance, regulation, or custom, shall subject or cause to be subjected*, any inhabitant of any State or Territory to the deprivation of any right secured by this act . . . shall be deemed guilty of a misdemeanor.

c. 114, 14 Stat 27, § 2 (emphasis added). Obviously, the emphasized language comprises the "crucial terms" from which the *Monell* Court inferred the "policy or custom" requirement. See Part IA2 above. Yet, there is a vast difference between § 2 of the 1866 Act and the modern Section 1983. The former was a criminal statute, the direct ancestor of the modern 18 U.S.C. § 242.[12] Since the notion of criminal liability of a city was unknown at the time, it seems unlikely that the 39th Congress had any kind of "policy or custom" requirement in mind when it enacted § 2 of the 1866 Act.

If the Court agrees, then this part of the argument need not continue. Since the "policy or custom" requirement arises from the "crucial terms" of § 1983, and since Congress could not have meant "policy or custom" at the only place where it used those "crucial terms" in the 1866 Act, then Congress could not have intended to impose a "policy or custom" requirement anywhere in that statute.

If, on the other hand, we assume that, by including the "crucial terms" in § 2 of the 1866 Act, Congress *did* intend to impose a "policy or custom" requirement on *that* section, it does *not* follow that such a requirement should be read into § 1 as well. Indeed, it's more plausible to conclude that Congress did *not* intend to impose such a requirement on § 1, or on any other part of the 1866 Act, except for § 2.

The restrictive language of § 2 stands in sharp contrast to the rest of the 1866 Act. Neither the phrase "color of ar law, statute, ordinance, regulation, or custom", nor the words "subject or cause to be subjected", are found in any

[12] *See Screws v. United States*, 325 U.S. 91, 98, 65 S.Ct. 1031, 89 L.Ed. 1495, 162 A.L.R. 1330 (1945); *United States v. Williams*, 341 U.S., at 83, and *Classic*, 313 U.S., at 327 n. 10.

of the other sections. And while the Court has not dealt with the absence of the phrase "subject or cause to be subjected," it has on several occasions drawn meaning from the fact that the "color of law" language appears *only* in § 2. It is to these cases that we now turn.[13]

Again our simplest example is found in *Jones*, 392 U.S. 409, which construed Section 1982, a statute that also arose from § 1 of the 1866 Act. In deciding that § 1 of the 1866 Act reaches private conduct, the Court reasoned that, if § 1 had been intended to reach only governmental conduct, "then much of § 2 would have made no sense at all." 392 U.S., at 424. The Court illustrated its point by quoting § 2 verbatim and emphasizing the "color of law" language. 392 U.S., at 424 n. 32. Since the "color of law" language was present in § 2, but not in § 1, Congress must have intended for § 1 to reach more than conduct committed under "color of law", i.e., private conduct.

Congress also omitted the "color of law" and "subject or cause to be subjected" language from § 6 of the 1866 Act, which imposed criminal penalties on "any person who shall knowingly and willfully obstruct, hinder, or prevent" the arrest of a person charged with violating the statute. c. 31, 14 Stat 28, § 6.

While we find no case construing § 6, both it and § 2 were carried forward to the 1870 Act.[14] There § 17 (re-enacting § 2 of the 1866 Act) contains the "color of law" and "subject or cause to be subjected" language, while § 11 (re-enacting § 6 of the 1866 Act) still applies to "any person." c. 114, 16 Stat 142, § 11, 144 § 17. Moreover, the 1870 Act contains several new sections which, like § 11, also impose criminal penalties on "any person" or "persons." These are §§ 4, 5, and 6, c. 114, 16 Stat. 141, which became §§ 5506, 5507, and 5508 of the Revised Statutes.

[13] Bearing in mind, of course, the ambiguous nature of the "color of law" language. See footnote 4 above.

[14] This part of the argument is particularly important if the view of the *Runyon* dissent should prevail. Under that view § 1981 arose from § 16 of the 1870 Act, and not § 1 of the 1866 Act. *See Runyon*, 427 U.S., at 195-211 (White, J., dissenting).

Section 6 of the 1870 Act (R.S. § 5508) made it a crime if "two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States." This is the original version of the modern 18 U.S.C. § 241, *United States v. Williams*, 341 U.S. 70, at 83, 71 S.Ct. 581, 95 L.Ed. 758 (1950), and it has long been settled that § 241 reaches private conduct. 341 U.S., at 75-76 (plurality), *Id.*, at 93 (Douglas, J., concurring).

Again this conclusion depends on the absence of the "color of law" language from § 6. Since conspiracies under color of law are reached by § 17 of the 1870 statute (§ 2 of the 1866 Act), it follows that "the principal purpose of § 6, unlike § 17, was to reach private action rather than officers of a State." 341 U.S. at 75-76 (plurality). *See, generally, Griffin v. Breckenridge*, 403 U.S. 88, 104, 91 S.Ct. 1790, 29 L.Ed.2d 388 (1971), and cases there cited.

Finally, we note §§ 4 and 5 of the 1870 Act (R.S. §§ 5506 & 5507), which also apply to "any person." These sections were passed to enforce the 15th Amendment, which provides that "[t]he right of Citizens of the United States to vote shall not be denied or abridged *by the United States or by any state* on account of race, color or previous condition of servitude." (emphasis added)

In *James v. Bowman*, 190 U.S. 127, 23 S.Ct. 678, 47 L.Ed. 979 (1903), the Court considered an indictment brought under § 5 of the 1870 statute (R.S. § 5507), which made it an offense for "any person" to "prevent, hinder, control, or intimidate, any person from exercising . . . the right of sufferage, to whom the right of sufferage is secured or guaranteed by the [15th Amendment]." c. 114, 16 Stat 141, § 5.

The Court read the 15th Amendment as giving Congress only the authority to legislate with regard to actions taken "by the United States or by any state," a requirement analogous to the "state action" requirement of the

14th Amendment, 190 U.S., at 136-137. Since § 5 of the 1870 Act (R.S. § 5507) did not confine itself to "state action" it was overbroad. Moreover, the Court refused to preserve its constitutionality by reading in a "state action" requirement. There were "no words of limitation, or reference, even, that can be construed as manifesting any intention to confine its provisions to the terms of the 15th Amendment." 190 U.S., at 140, quoting *United States v. Reese*, 92 U.S. 214, 2 Otto 214, 23 L.Ed. 563 (1875). Obviously, the missing "words of limitation" were to be found in the "color of law" language, then located in § 17 of the 1870 Act (§ 2 of the 1866 Act). The Court said it "must take these sections of the statute as they are," 190 U.S., at 141, and it refused to "disregard . . . words that are in the section" and to "insert . . . words that are not in the section." "The language is plain," the Court wrote. "There is no room for construction." *Id. See also, United States v. Reese*, 92 U.S. 214, which struck down § 4 of the 1870 Act (R.S. § 5506) on similar grounds.

We have seen in Part IA2 that the "policy or custom" requirement stems from certain "crucial terms." These cases here show that, if Congress really meant to impose a "policy or custom" requirement by including these "crucial terms" in § 2 of the 1866 Act, then its decision not to include them in § 1, or any other part of the 1866 Act, means that Congress intended that § 1—hence Section 1981—would *not* contain a "policy or custom" requirement.

We also note that the literal reading given the sections involved in these cases is consistent with the maxim that a Reconstruction era civil rights statute must be given "a sweep as broad as its language", *Jones*, 392 U.S., at 437, quoting, *United States v. Price*, 393 U.S. 787, at 801, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1960). To read the "crucial terms" into § 1 of the 1866 Act, when they simply do not appear there,

would fly in the face of this established approach to the Reconstruction era statutes. Ultimately, to read a "policy or custom" requirement into Section 1981 would be "to seek ingenious analytical instruments" to carve an exception from Section 1981 that simply was never intended. *Jones*, 392 U.S., at 437, quoting *Price*, 383 U.S., at 801.

II. The familiar rule of *respondeat superior* offers the most suitable standard for § 1981 liability.

In Part I we demonstrated that Congress did not intend to impose a *Monell* style "policy or custom" requirement on Section 1981. Now we inquire as to what Congress did intend.

A. Considerations of legislative intent require imposition of a *respondeat superior* standard.

Legislative intent can be drawn from Congress' silence. This was the approach taken in the Section 1983 cases involving immunities. There, although the statute was silent on the immunity issue, the Court inferred legislative intent from the fact that, in the year 1871, questions of legislative and judicial immunity were viewed as "settled principles." *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) (judicial immunity). The Court refused to believe that Congress "would impinge on a tradition so well grounded in history and reason" without mentioning it in the language of the statute. *Tenny v. Brandhove*, 341 U.S. 367, 376, 71 S.Ct. 783, 95 L.Ed. 1019 (1951) (legislative immunity).[15] On the other hand, the Court found "no tradition" of qualified good faith immunity for municipal corporations and thus refused to impose it. *Owen v. City of Independence*, 445 U.S. 622, 638, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980).[16]

[15] *See also, Scheurer v. Rhodes*, 416 U.S. 232, 243-245, 94 S.Ct. 1683, 40 L.Ed. 90 (1974); *Wood v. Strickland*, 420 U.S. 308, 316-319, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); and *Imbler v. Patchman*, 424 U.S. 409, 417-424, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

[16] *Cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed. 616 (1981) (city immune from punitive damages).

This approach allows Section 1981 to be read in light of the "settled principles" of 1866 (or 1870 if the *Runyon* dissent is correct). As it turns out, the prevailing notion of municipal liability in the middle of the 19th Century was the familiar rule of *respondeat superior*. This was demonstrated by the *Tuttle* dissent, 471 U.S., at 834-839 (Stevens, J., dissenting)[17], and this area has been ably explored in Part I B of the *amicus curiae* brief of the NAACP Legal Defense Fund in our case. Of course, *Tuttle* was a Section 1983 case, and the dissent there could not overcome the language of the statute. Here matters are different.

B. 42 U.S.C. § 1988 also compels adoption of a *respondeat superior* standard

A second avenue of inquiry acknowledges the fact that private causes of action under Sections 1981 and 1982 do not arise from the express language of those statutes. Rather in *Sullivan v. Little Hunting Park*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969), the Court held that in "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." *Id.*, at 239.[18] The *Sullivan* Court went on to say that in fashioning a private remedy under Sections 1981 and 1982, "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes." 396 U.S., at 240. In support of its approach, the Court cited 42 U.S.C. § 1988, which directs the district courts to exercise their jurisdic-

[17] We incorrectly cited *Praprotnik*, 108 U.S. 937 (Stevens, J., dissenting), for this proposition in our Petition, p. 26.

[18] *See also, Jones v. Alfred H. Mayer Co.*, 392 U.S., at 414 & n.13, and *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-460, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) (§ 1981). *See, generally, Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). One can also argue that Section 1981 and 1982 claims are *expressly* allowed by § 3 of the 1866 Civil Rights Act, which provides that "the district courts of the United States shall have . . . cognizance . . . of all causes, civil and criminal, affecting persons who are denied . . . any of the rights secured to them by the first section of this act." c. 31, 14 Stat 27. *See Cannon*, 441 U.S., at 736 n. 7 (Powell, J., dissenting). For purposes of our argument, however, that approach leads to the same place as the argument based upon the implied cause of action, i.e., to 42 U.S.C. § 1988, the modern version of § 3 of the 1866 Act.

tion to enforce the civil rights laws. . .

> . . . in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil and criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . .

After *Sullivan*, the Court applied Section 1988 to hold that questions of limitations under Section 1981 are to be governed by "appropriate" state law. *Johnson v. Railway Express Agency*, 421 U.S. 454, 462, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). The Court cautioned, however, that "considerations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration." 421 U.S., at 465.

This was also the approach in *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), where the Court refused to allow a county to be held liable under Section 1983 for the constitutional torts of its sheriff. While state law expressly allowed counties to be held liable for the civil rights violations, this feature could not be incorporated into Section 1983, since the result would be "less than consistent" with *Monroe v. Pape*. 411 U.S., at 706. The *Moor* Court reasoned that, because of the *Monroe* decision, its case was "a wholly different case from those in which, lacking any clear expression of congressional will, we have been called upon to decide whether it is appropriate to look to state law or to fashion a single federal rule in order to fill the interstices of federal law." *Id.*, 411 U.S., at 701 n. 12.

Of course, in our case there is no "clear expression of Congressional will". As we showed in Part I, *Monell's* "policy or custom" requirement is inapposite to Section 1981. Thus, the Court is perfectly free to look to state law or to fashion

"a single federal rule."[19]

Texas law leads us unhesitatingly to a rule of *respondeat superior*.[20] Similarly, in adopting a single federal standard the Court must also defer to common law principles. *Cf. Carey v. Piphus*, 435 U.S. 247, 252-259, 98 S.Ct. 1042, 55 L.Ed. 2d 252 (1978).

C. Policy arguments favor adoption of a *respondeat superior* standard.

Whatever course it takes, the Court will ultimately have to address the policy implications of its decision.

1. A rule of *respondeat superior* will further the policies of eradicating racial discrimination, compensating for civil rights deprivations, and deterring abuses of power.

The policy behind Section 1981 is easily understood after reading *Jones*. The policies of compensation and deterrence are closely related, and have been explored at length in

---

[19] *Cf. Robertson v. Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978) (survivorship); *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) (survivorship); *Occidental Life Ins. Co. v. E.E.O.C.*, 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977) (limitations); *Board of Regents v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980) (limitations); *Burnett v. Grattan*, 468 U.S. 42, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984) (limitations); *Wilson v. Garcia*, 471 U.S. 260, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) (limitations); and *Fielder v. Casey*, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988) (notice of claim).

[20] *City of Galveston v. Posnainsky*, 62 Tex. 118 (Tex. 1884); *White v. City of San Antonio*, 94 Tex. 313, 60 S.W. 426 (1901); *City of Wichita Falls v. Lewis*, 68 S.W.2d 388 (Tex. Civ. App. - Fort Worth 1934, writ dism'd); *Schroggins v. City of Harlingen*, 131 Tex. 237, 112 S.W.2d 1035 (1938); *City of Houston v. Quinones*, 142 Tex. 282, 177 S.W.2d 259 (1943); *Bates v. City of Houston*, 189 S.W.2d 17 (Tex. Civ. App. -Galveston 1945, writ ref'd w.o.m.); *Dilley v. City of Houston*, 148 Tex. 191, 222 S.W.2d 992 (1949); *City of Midland v. Hamlin*, 239 S.W.2d 159 (Tex. Civ. App. - El Paso 1950, no writ); *Crow v. City of San Antonio*, 294 S.W.2d 899 (Tex. Civ. App. - San Antonio 1956, no writ); *City of Orange v. LaCoste, Inc.*, 210 F.2d 939 (5th Cir. 1954); *Sarmiento v. City of Corpus Christi*, 465 S.W.2d 813 (Tex. Civ. App. - Corpus Christi 1971, no writ); *Contrelli Trust v. City of McAllen*, 465 S.W.2d 804 (Tex. 1971); *City of Round Rock v. Smith*, 687 S.W.2d 300 (Tex. 1985); *City of Gladewater v. Pike*, 727 S.W.2d 514 (Tex. 1987).

cases arising under Section 1983, as well as *Bivens* style actions.[21]

2. *Respondeat superior* provides a clear, easily applied legal standard.

Ten years after *Monell*, Section 1983 litigants are still "confronted with a legal landscape whose contours are 'in a state of evolving definition and uncertainty'." *Praprotnik*, 108 S.Ct., at 922 (plurality), quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256, 101 S.Ct. 2748, 2754, 69 L.Ed.2d 616 (1981). Of course, the Court had no choice in deciding *Monell*, since the language of § 1983 represents a "clear expression of Congressional will." Here, however, there is no such imperative. The Court is writing on a clean slate and, for over a century, *respondeat superior* has provided a simple, widely understood, easily applied rule of law.

3. The policies that favor restricting liability under Section 1983 do not apply to Section 1981

In the century since the *Slaughter-House Cases*, the "rights, privileges, and immunities secured by the Constitution" have expanded tremendously. The Court has "widened the scope of Section 1983 by recognizing constitutional rights that were unheard of in 1871." *Praprotnik*, 108 S.Ct., at 923.

The vague language of Section 1983 has provided no "logical stopping place", and the Court has become alarmed that Section 1983 might become a "font of tort law" where "every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establish[es] a violation of the Fourteenth Amendment." *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). *See also, Parratt v. Taylor*, 451 U.S. 527, 546-553, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (Powell, J. concurring).

[21] *See Monroe*, 365 U.S., at 651-656; *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 397, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); *Mitchum v. Foster*, 407 U.S. 225, 238-242, 91 S.Ct. 2151, 32 L.Ed.2d 705 (1972); *Carey*, 435 U.S., at 254-257; *Robertson v. Wegmann*, 436 U.S., at 590-591; *Butz v. Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); *Owen*, 445 U.S. at 651-656; *Carlson v. Green*, 446 U.S. 18, *Newport v. Fact Concerts, Inc.*, 453 U.S., at 269.

These concerns are not pertinent here. The specific, enumerated rights of Section 1981 stand in sharp contrast to the vague "rights, privileges, and immunities" secured by Section 1983. The language of Section 1981 *does* provide a "logical stopping place."

4. Other alternatives

If, despite our arguments, the Court decides to draw the line somewhere short of *respondeat superior*, then see our Petition, p. 27, for another approach to the problem.

III. There was evidence from which the jury could conclude that Superintendent Wright was a "policymaker" with regard to transfers of coaches and athletic directors.

Once the references to Section 1981 are removed, the "Question Presented" by the Cross-Petitioner is easily answered. *Pembaur v. City of Cincinnati*, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986), teaches that DISD would not be liable under Section 1983, unless Superintendent Wright was the official charged with making policy to govern transfers of coaches and athletic directors. If Wright were not a policymaker, as the Question Presented assumes, then obviously the district would not be liable.

Of course, this is exactly what the Court of Appeals said. The Fifth Circuit held that the jury instruction concerning municipal liability was deficient "because it did not state that the city could be bound by the principal or superintendent only if he was a designated policymaking authority." Pet. App. 21A. The discussion that follows[22] concludes that "Wright's final exclusive authority to make discrete individual transfer decisions would not alone subject the DISD to responsibility . . . *unless* he *also* had final authority with respect to general DISD transfer *policy* .." Pet. App. 23A (emphasis in original).

The correct question, obviously, is whether Wright was the official charged with making policy to govern such transfers. The Court in *City of St. Louis v. Praprotnik*, 108 S.Ct. 915, 924-925 (1988), said that this is a question of state law, but Texas law can only take us so far.

[22] The following line was omitted from the beginning of the text at Pet. App. 22A: "...sole and unreviewable authority to reassign teachers in..."

Under Texas law a school district's board of trustees has "the exclusive power to manage and govern the free public schools of the district." Tex. Educ. Code section 23.26(b) (Vernon's 1987). At the time our suit was filed, however, there was no Texas statute dealing with the powers and duties of the superintendent Linus Wright testified that, as superintendent, he was the chief executive officer of the district, accountable only to the school board itself. Tr. 381-382. This accords with a subsequently adopted statute designating the superintendent as "the educational leader and the administrative manager of the school district." Tex. Educ. Code section 13.351 (a) (Vernon's Supp. 1989).

Section 23.26(d) of the Education Code authorizes the trustees to "adopt such rules, regulations, and by-laws as they may deem proper" and this, along with 23.36(b) quoted above, authorizes the board to delegate its powers. *See Corpus Christi Independent School Dist. v. Padilla*, 709 S.W.2d 700, 707 [syl. 16] (Tex. App. - Corpus Christi 1986, no writ).

While our record does not show that the DISD board expressly gave Wright authority to make policy with regard to transfers of coaches and athletic directors, it does allow such an inference. While the Board approved policies to deal with transfers of teachers, it promulgated none to deal with transfers of coaches and athletic directors. Jt. App. 65-67. Wright described such transfers as a "gray area" where matters were left up to him and his subordinates. Jt. App. 70.

Moreover, unlike any of the cases which the Court has heard, Wright actually promulgated policies to deal with coach/athletic director transfers, Jt. App. 68, 70, some of which were formal in nature. Tr. 403-405. *Cf. Praprotnik*, 108 S.Ct., at 933 (Brennan, J., concurring). Finally, unlike *Praprotnik*, Wright was actually the final decisionmaker. There was absolutely no recourse from his decision to transfer Jett. Jt. App. 65, 69-70. *Cf., Praprotnik*, 108 S.Ct., at 926 [syl. 8, 9] (plurality). And, of course, he was the chief executive officer of the school district.

Frankly, it's difficult to imagine how much stronger the evidence could be, save for an actual board resolution expressly delegating policymaking power to Wright. That the evidence on this point is not fully developed should come

as no surprise. The case was tried in October of 1984, before *Pembaur*. (and before *Tuttle*). If Jett must make further proof that Wright was a "policymaker", then he should have that opportunity when this part of the case is retried.

CONCLUSION

The Court should affirm Petitioner's Section 1981 recovery against Respondent. The Section 1983 portion of the case should be remanded for retrial with appropriate instructions, as was done in *Tuttle*, 471 U.S., at 824, and *Praprotnik*, 108 S.Ct., at 928.

Respectfully submitted,

FRANK GILSTRAP
FRANK HILL
SHANE GOETZ
Hill, Heard, Oneal,
Gilstrap & Goetz
1400 West Abram
Arlington, Texas 76013
(817) 261-2222

[redacted]

[redacted]

[redacted]

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision Involved	3
Statutory Provisions Involved	3
Statement of the Case	4
Legislative Background	9
Introduction to Argument and to Summary of Argument	13
Summary of Argument	14
Argument	16
I. This Court's Decision in *City of St. Louis v. Praprotnik* Governs the Case	16
A. Scope of Review	16
B. Implied Actions	21
C. *Respondeat Superior*	33
II. *Respondeat Superior* is Not a Legally Valid Basis for Imposing Liability on the Dallas Independent School District Under 42 U.S.C. § 1981	37
Conclusion	48

TABLE OF AUTHORITIES

Cases: PAGE

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) 19

Brown v. Government Services Administration, 425 U.S. 820 (1976) 17, 18

Burks v. Lasker, 441 U.S. 471 (1979) 18

Cannon v. University of Chicago, 441 U.S. 677 (1978).....18, 19, 32

Carpenter v. City of Fort Wayne, Ind., 637 F. Supp. 889 (N.D. Ind. 1986) 19

Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979) 18, 19, 20

City of Greenwood v. Peacock, 384 U.S. 808 (1966) ... 19

City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985) .*passim*

City of St. Louis v. Praprotnik, ____ U.S. ____, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) .....*passim*

Civil Rights Cases, 109 U.S. 3 (1883) 33, 43, 46

Corpus Christi Independent School District v. Padilla, 709 S.W.2d 700 (Tex. App.—Corpus Christi 1986, no writ) 6

Cort v. Ash, 422 U.S. 66 (1975) 22, 23, 31, 32

Daniels v. Williams, 474 U.S. 327 (1986) 18

Dean v. Gladney, 621 F.2d 1331 (5th Cir. 1980) 19

District of Columbia v. Carter, 409 U.S. 418 (1973).....19, 21, 22

PAGE

Franchise Tax Bd. of Calif. v. United States Postal Service, 467 U.S. 512 (1984) 19

General Building Contractors Association v. Pennsylvania, 458 U.S. 375 (1982).....35, 40, 41

Georgia v. Rachel, 384 U.S. 780 (1966)..... 40

Givhan v. Western Line Consolid. Sch. Dist., 439 U.S. 410 (1979) 35

Great American Federal Savings & Loan Assn. v. Novotny, 442 U.S. 366 (1979).....18, 33

Griffin v. Breckenridge, 403 U.S. 88 (1971)..... 35

Hinojosa v. State, 648 S.W.2d 380 (Tex.App.—Austin 1983)..... 7

Hurd v. Hodge, 334 U.S. 24 (1948) 23, 41

In re Turner, 24 Fed. Cas. 337 (No. 14,247) (C.C.D. Md. 1867)..... 29

Insurance Group Committee v. D. & R.G.W. R. Co., 329 U.S. 607 1947) 5

Jett v. Dallas Independent School District, 798 F.2d 748 (5th Cir. 1986), *on motion for rehearing*, 837 F.2d 1244 (5th Cir. 1988).....38, 44

Johnson v. Railway Express Agency, 421 U.S. 454 (1975) 17

Jones v. Alfred H. Mayer Co., 392 U.S. 409 1968) 17, 26, 33

Leonard v. City of Frankfort Electric and Water Plant Board, 752 F.2d 189 (6th Cir. 1985)..... 38

Mahone v. Waddle, 564 F.2d 1018 (3rd Cir. 1977), *cert. denied*, 438 U.S. 904 (1978) .....*passim*

PAGE

Maine v. Thiboutot, 448 U.S. 1 (1980) 18

Martinez v. California, 444 U.S. 277 (1980)..... 35

Monell v. Department of Social Services, 436 U.S. 658 (1977).....*passim*

Monroe v. Pape, 365 U.S. 167 (1961).....19, 28, 34, 39

Mt. Healthy City School Dist. Board of Education v. Doyle, 429 U.S. 274 (1977) 35

National Railroad Passenger Corp. v. National Assn. of Railroad Passengers, 414 U.S. 453 (1974) .....*passim*

Patterson v. McLean Credit Union, No. 87-107 (Order of April 25, 1987) 25

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) ...*passim*

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981)..... 18

Piper v. Chris-Craft Industries, 430 U.S. 1 (1977) 32

Preiser v. Rodriguez, 411 U.S. 475 (1973) 32, 33

Professional Association of College Educators v. El Paso Community (College) District, 678 S.W.2d 94 (Tex. App.—El Paso 1984, writ ref'd n.r.e.) 6

Runyon v. McCrary, 427 U.S. 160 (1976) .....*passim*

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) ... 32

Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975)..... 32

Springer v. Seamen, 821 F.2d 871 (1st Cir. 1987) 38

Strauder v. West Virginia, 100 U.S. 303 (1879).....18, 41

Switchmen v. National Mediation Board, 320 U.S. 297 (1943) 33

PAGE

Texas & Pacific R.R. Co. v. Rigsby, 241 U.S. 33 (1916) 23

Tillman v. Wheaton-Haven Recreation Assn., 410 U.S. 431 (1973) 17

United States v. Rhodes, 27 Fed. Cas. 785 (No. 16,151) (C.C.D. Ky. 1866) 29

United States v. Smelting Co., 339 U.S. 186 (1950) 5

Virginia v. Rives, 100 U.S. 313 (1879)..... 43

Washington v. Davis, 426 U.S. 229 (1976) 35

Williams v. Bennett, 689 F.2d 1370 (11th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983)..... 19

Zwickler v. Koota, 389 U.S. 241 (1967)..... 22

Constitutional Provisions:

U.S. Const. amend. XIII.....*passim*

U.S. Const. amend. XIV.....*passim*

Texas Const. Art. 1, § 27..... 6

Statutes:

13 Stat. 774 (1865)..... 10

18 U.S.C. § 241 27

18 U.S.C. § 242 27

28 U.S.C. § 1254(1)..... 2

42 U.S.C. § 1981.....*passim*

42 U.S.C. § 1983.....*passim*

Act of June 27, 1866, 14 Stat. 74 .....*passim*

Act of May 4, 1870, ch. 72, 16 Stat. 96 13

Civil Rights Act of 1866, ch. 31, 14 Stat. 27.....*passim*

Civil Rights Act of 1871, ch. 22, 17 Stat. 13.....*passim*

PAGE

Enforcement Act of 1870, ch. 114, 16 Stat. 140 ..... *passim*

Revised Statutes of 1874 33

Tex. Educ. Code § 13.351 37

Tex. Educ. Code § 23.01 ..... 7, 36

Tex. Educ. Code § 23.26 ..... 7, 37

Tex. Rev. Code Anno. art. 5154c, sec. 6. 6

Articles:

A. Avins, *The Civil Rights Act of 1866, The Civil Rights Bill of 1966, and the Right to buy Property*, 40 S. Cal. L. Rev. 274 (1967) 43

Bickel, *The Original Understanding and The Segregation Decision*, 69 Harv. L. Rev. 1 (1955) 10, 11

Comment, *Implied Private Rights of Action: The Courts Search for Limitations in a Confused Area of the Law*, 13 Cumb. L. Rev. 569 (1983) 23

Delaware Law School, *The Reconstruction Amendment Debates*, (A. Avins, editor 2nd ed. 1974) 18, 27

H. Flack, *The Adoption of the Fourteenth Amendment* (1908) 11

J. James, *The Framing of the Fourteenth Amendment* (1956) 11

J. James, *The Ratification of the Fourteenth Amendment* (1984) 11

B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction*, 39th Congress, 1865-1867 (1914) 11

PAGE

Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 Ark. L. Rev. 741 (1987) 43

E. McPherson, *The Political History of the United States of America During the Period of Reconstruction* (1871) 27

Private Causes of Actions from Federal Statutes: A Strict Standard for Implication by Sole Reliance on Legislative Intent, 14 U. Rich. L. Rev. 605 (1980) 23, 32

K. Stampp, *The Era of Reconstruction, 1865-1877* (1965) 41

2A Sutherland, *Statutes and Statutory Construction* (J. Singer 4th ed. 1984) 43

J. TenBroek, *Equal Under the Law* (1958) 43

Walter, *The Ku Klux Klan Act and the State Action Requirement of the Fourteenth Amendment*, 58 Temp. L. Q. 3 (1985) 12

Miscellaneous:

Journal of the Joint Committee on Reconstruction, *reprinted as* S. Doc. No. 711, 63rd Cong., 3rd Sess. (1915) 11

Report of Maj. Gen. Carl Schurz on the Condition of the South (December 19, 1865), S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865) 9

Report of the Joint Committee on Reconstruction XIV, H.R. Rep. 30, 39th Cong., 1st Sess. (1866) 11

1 Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose, Title XIV, Ch. 7 (1872) 29

PAGE

S. B. 61, 39th Cong., 1st Sess. (1866), *reprinted in* Cong. Globe, 39th Cong., 1st Sess. (1866) 10, 18

S. B. 715, 41st Cong., 2nd Sess. (1871)..... 27

S. Exec. Doc. No. 6, 39th Cong., 2nd Sess.....26, 27

S. Rep. 1, 42nd Cong., 1st Sess. (1871) (Report of the Select Committee to Investigate the Alleged Outrages in the South)..... 9

S. Rep. 41, 42nd Cong., 2nd Sess. (1872) (Report on Conditions in the South)..... 9

H.R. 320, 42nd Cong., 1st Sess. (1871).....12, 13

H.R. Rep. No. 37, 41st Cong., 3rd Sess. (1871) (Report on Protection of Loyal and Peaceable Citizens in the South)..... 9

Cong. Globe, 39th Cong., 1st Sess. (1866).....*passim*

Cong. Globe, 41st Cong., 2nd Sess. (1870) 12, 27, 41

Cong. Globe, 42nd Cong., 1st Sess. (1871) .....*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2084
No. 88-214

NORMAN JETT, *Petitioner,*

—v.—

DALLAS INDEPENDENT SCHOOL DISTRICT, *Respondent.*

DALLAS INDEPENDENT SCHOOL DISTRICT, *Cross-Petitioner,*

—v.—

NORMAN JETT, *Cross-Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE RESPONDENT*

Opinions Below

The opinion of the Fifth Circuit is reported at 798 F.2d 748, while the opinion on Suggestion for Rehearing En Banc is

---

* Dallas Independent School District is the Petitioner in Cause No. 88-214; however, for ease of identification, and with the agreement of counsel and the consent of the Clerk, it will be styled the "Respondent" throughout these proceedings.

reported at 837 F.2d 1244. The original opinion is set forth in the Appendix to Dallas Independent School District's Petition for Writ of Certiorari (which is attached to the printed petition) at pp. 1A-32A** and the opinion on the Suggestion for Rehearing is reproduced at pp. 33A-44A. The opinion of the District Court is not reported. The Memorandum Opinion and Order is set forth in the Appendix at pp. 45a-63a. The Amended Reformed Judgment appears at pp. 64a-65a.

Jurisdiction

The mandate of the Fifth Circuit Court of Appeals issued on February 5, 1988. Appendix at 66a-67a. Norman Jett filed a petition for writ of certiorari on June 21, 1988, which was granted on November 7, 1988, limited to the first question presented by the petition. Respondent Dallas Independent School District filed its petition for certiorari on July 21, 1988 and it, too, was granted on November 7, 1988. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

Questions Presented

Whether a school district may be held vicariously liable under Section 1981, 42 U.S.C. § 1981, for the actions of a non-policymaking employee.

Whether the Fifth Circuit erred by not dismissing the section 1983 (and § 1981) claims against Dallas Independent School District since they were predicated solely upon the doctrine of *respondeat superior*.

** References in this brief to the Appendix attached to the petition for certiorari filed by Petitioner Jett will hereafter be cited as "_____pa." References to the Appendix attached to Respondent's petition for certiorari will be cited as "_____a" and references to the separate Joint Appendix will be designated as "_____A." References to the Trial Transcript will be designated as "_____T."

Constitutional Provision Involved

United States Constitution, Amendment 13, Section 1:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Statutory Provisions Involved

1. Title 42, United States Code § 1981:

   All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of white persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. Title 42, United States Code § 1983:

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Other statutory provisions, and acts of Congress, which are substantially involved in this case are noted in the brief of the petitioner at p. 2 and are reproduced in the Joint Appendix.

Statement of the Case

Frederick Todd, a black, was assigned as principal of South Oak Cliff High School in 1975. When he arrived at South Oak Cliff, petitioner Norman Jett, plaintiff below,[1] a white male, was already assigned there. In 1983, believing that it was best for his school, Todd requested and received permission from Linus Wright, then General Superintendent of Schools of Dallas Independent School District (hereinafter also called "DISD"), to reassign plaintiff. The assignment was effective April 4, 1983.

Plaintiff was employed by the Dallas Independent School District as a teacher[2] in 1957. In 1962, he was assigned to SOC as a teacher and an assistant coach and later, in 1970, he was assigned to be the head football coach and athletic director. He remained in the position of teacher/head football coach at SOC until April, 1983, when he was reassigned, first to security, then, as a teacher and assistant coach and transferred to another school within the district. Rather than accept his reassignment, Jett resigned from his employment with the school district.[3]

---

1 Hereinafter the parties will be referred to according to their designation in the trial court.

2 Although petitioner Jett was ultimately assigned as an athletic director and coach at South Oak Cliff High School (hereinafter called "SOC"), he was originally hired, and remained employed throughout his career at Dallas Independent School District, under a "TEACHER CONTRACT." Plaintiff's Response to Defendants' Request for Admissions, Requests Nos. 1-5, 7. The plaintiff's Teacher Contract is reproduced in the Appendix at 19A-21A. DISD does not use any other employment contract with its non-administrative professionals other than the "teacher contract." Jett was administratively assigned to his position at SOC pursuant to paragraph 3 of his contract. *See* Testimony of Frederick Todd, 53T-54T.

3 Jett claimed that he was constructively discharged from his position with the DISD; however, the Fifth Circuit rejected this allegation "as a matter of law." Appendix at 11a. This finding is now the law of the case. *See United States v. Smelting Co.*, 339 U.S. 186, 198 (1950); *Insurance Group Committee v. D. & R.G.W. R. Co.*, 329 U.S. 607, 612 (1947).

Suspecting that his school principal's request to have the General Superintendent reassign him was, in part, racially motivated, Jett brought suit against Todd and the Dallas Independent School District[4] claiming reverse discrimination under 42 U.S.C. § 1981[5] and a denial of First Amendment rights pursuant to § 1983.[6] He did not sue Dallas Independent School District's General Superintendent of Schools, Linus Wright, who is white. The reverse racial discrimination claim that is before this Court derives from paragraph VI of the First Amended Complaint and is based upon Section Sixteen of the Enforcement Act of 1870, ch. 114, 16 Stat. 140.

The results of the litigation are detailed in the initial opinion of the Fifth Circuit. Appendix at 5a. On appeal, the United States Court of Appeals for the Fifth Circuit rejected plaintiff's claim that he had been deprived of a property interest in his assignment as a coach and athletic director. It set aside the jury finding that plaintiff had been constructively discharged and left intact a finding that Todd's recommendation that Jett be reassigned was racially motivated and in retaliation for free speech. Feeling that the jury findings were unclear about whether the General Superintendent was a policymaker, the court remanded for a new trial, on a *respondeat superior* the-

---

4 The individual members of the Dallas Independent School District Board of Trustees are nominal parties since Jett sued them only in their official capacities.

5 As will be discussed in the body of this brief, plaintiff's § 1981 claim was, like his First Amendment claim, brought into federal court via § 1983.

6 The jury award based upon Jett's free speech contention, brought under 42 U.S.C. § 1983, was, as to DISD, reversed by the appellate court and the holding is not, with one exception, before this Court. Appendix at 25a-27a. Defendant's petition for certiorari was granted on DISD's challenge to the Fifth Circuit's failure to dismiss the free speech allegations against it for failure to state a claim. *See* Cross-Petition for Writ of Certiorari, Question 1.

ory, against DISD. The appellate court ordered that on retrial the jury determine if the General Superintendent knew of the illegal motivations behind the requested transfer, implying that if he did know, DISD could be liable.

Several points must be emphasized. One, although General Superintendent Linus Wright's decision to reassign plaintiff was not subject to review *per se*, any violation by Todd or Wright of law or school board policy was subject, pursuant to law and Board policy, to further examination by the Board of Trustees.[7] Hence, Jett could have claimed before the Board of Trustees that Wright or Todd had violated DISD's anti-discrimination policies or that the General Superintendent had violated DISD's transfer policy.[8] Defendant's policies only prevent appellate type review of a transfer when the decision does not implicate constitutional, statutory or policy violations. As long as the General Superintendent does not violate policy or

7 Texas Constitution Art. 1, § 27; Tex. Rev. Code Anno. art. 5154c, sec. 6. In *Professional Association of College Educators v. El Paso Community (College) District*, 678 S.W.2d 94 (Tex. App.—El Paso 1984, writ ref'd n.r.e.) ("*PACE*"), the court ruled that Texas Constitution Art. 1, § 27 requires "those trusted with the powers of government [to] . . . surely . . . stop, look and listen" to complaints filed by those being governed. They must consider the petition, address or remonstrance. 678 S.W.2d at 96. Article I, § 27 of the Texas Constitution and Tex. Rev. Civ. Stat. Anno. art. 5154c, § 6 were also authoritatively construed in the case of *Corpus Christi Independent School District v. Padilla*, 709 S.W.2d 700 (Tex. App.—Corpus Christi 1986, no writ). As to the constitutional right to grieve, *Padilla* found that the *PACE* decision was "sound," 709 S.W.2d at 704, and adopted it. The court specifically held that an "open forum" before a school board where persons have the opportunity to freely express their views is the minimum required to satisfy the Texas constitutional requirements. *Id.* The public employer is not required by the Texas Constitution to respond to the presentation.

8 Jett did not file a grievance over the transfer or appear before the Board of Trustees alleging any violation of law or policy.

law, he is free to assign and reassign for any reason, or for no reason.[9]

Second, although the plaintiff and *amicus* National Education Association try to claim that General Superintendent Wright was or could be a policymaker, he has never been, and under state law cannot be, delegated authority to make policy.[10] Tex. Educ. Code §§ 23.01, 23.26(b), 23.26(d). *See, e.g., Hinojosa v. State*, 648 S.W.2d 380, 386 (Tex.App.—Austin 1983).

Dallas Independent School District's Board of Trustees has established several policies regarding transfers and reassignments by which the General Superintendent was bound.[11] More

9 Board of Trustees Policy DK-R (Local) provides that on review of an involuntary transfer, the General Superintendent shall "issue a decision that shall be final and binding." Paragraph 6, Page 5 of 6, Plaintiff's Exhibit 9. This "finality" regulation applies only to an appeal of an involuntary transfer and not a formal grievance. Policy DK-R (Local) states that the appeal procedure "shall not be deemed a formal grievance." *Id.* It is for this reason that Mr. Wright testified at trial that there is no appeal to his decision "[a]s far as assignment . . . ." 405T; *see also* 423T.

10 Plaintiff alleged in his First Amended Complaint that "Defendant BOARD OF TRUSTEES of the DALLAS INDEPENDENT SCHOOL DISTRICT, by virtue of the statutes of the State of Texas, is given and charged with the responsibility for the possession, care, control, and management of the affairs of defendant DALLAS INDEPENDENT SCHOOL DISTRICT . . . ." Paragraph IID at 7A. We agree with this admission. *See, e.g.*, Defendants' First Amended Answer, paragraph IID at 24A.

11 General Superintendent Wright, in response to questions asked by plaintiff's counsel, testified that the transfer policy applied to all professional employees except "Administrators," and that Jett, although his school's athletic director was not an Administrator. 67A (395T-396T). Mr. John Santillo, who was at the time the Assistant Superintendent of Personnel, expressed his belief that the Board of Trustees' transfer policy did apply to the Jett reassignment. 488T. Wright was bound by those policies and, assuming, *arguendo*, that he failed to follow them, would have been at fault. However, the fact that he might not have followed the policies which were created by the true policy-making body of the District, the Board of Trustees, does not make him

importantly, the Board of Trustees had established policies forbidding racial discrimination or retaliation for labor or First Amendment activities.[12] *See, e.g.*, Board of Trustees Policy DAA, Plaintiff's Trial Exhibit 3.[13] The General Superintendent's final authority to make discrete individual transfer decisions would not subject the DISD to responsibility for his actions.[14] Quite simply, Wright was not and could not be a policymaker.[15]

---

a policymaker. Rather, the opposite is true. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83, 483n.12 (1986) (hereinafter cited as *Pembaur*); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) ("At the very least there must be an affirmative link between the policy and the particular constitutional violation alleged").

12 The General Superintendent testified that it is inconsistent with the policy of the DISD to use as a reason for demotion or transfer the public speech or remarks made by one of its employees 449T-450T. This testimony was uncontroverted. Accordingly, as to the First Amendment claim, the appellate court should have rendered judgment in favor of defendant, Dallas Independent School District. *City of St. Louis v. Praprotnik*, ____ U.S. ____, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). Even if a First Amendment violation occurred when the General Superintendent made the transfer decision, it would have been in violation of defendant's policy, and not in accordance with it.

13 Hereinafter citations to Trial Exhibits will be to the party and exhibit number only. Plaintiff's Exhibits 9-15 are other policies, established by the Board of Trustees, which control the discretion of the General Superintendent.

14 Having concluded that the jury findings were deficient and could not support the award of damages against the DISD under section 1983, the Fifth Circuit remanded the case for retrial, holding that DISD might be liable if General Superintendent Wright acted with discriminatory intent or intent to retaliate for the exercise of free speech activities. In light of *Praprotnik*, the Fifth Circuit's decision is error. The court should have applied state law to the case and dismissed the claims brought pursuant to 42 U.S.C. § 1983. Because this is so straightforward, and since state law is so clear on the subject of who is a school district's policymaker, *see supra* at notes 9, 10, 11 and 12; *infra* at note 36, we will not dwell upon the issue further. Regardless of whether the Court affirms the section 1981 portion of the Fifth Cir-

(*Footnote 15 appears on following page*)

Legislative Background

In mid-December, 1865, the "Schurz Report," Report of Maj. Gen. Carl Schurz on the Condition of the South (December 19, 1865), was presented to Congress. The report cautioned that, in spite of the abolition of slavery, the establishment by the southern states of "black codes," offshoots of the antebellum slave codes, were preventing blacks from taking their rightful place within society. S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865).

With the Schurz Report and others like it[16] as an impetus, Congress tried to end the anarchy existing at the end of the Civil War, caused, as the Radical Republicans viewed it, by the Southern States' intransigence, by passing legislation aimed at defining and protecting the rights of the former slaves, and formulating the relationship of the confederate states to the federal government. These early Civil Rights Laws have become the mechanism for today's civil rights litigation. One of the first of the early civil rights laws, passed in the same legislative session, the 39th, that saw the Fourteenth Amendment sent to the states

---

cuit's holdings, it should rule that the § 1983 claims must be dismissed. Likewise, if the Court affirms the ruling that *respondeat superior* may not be utilized to impose § 1981 liability upon DISD, as it should, it should apply *Praprotnik* and order the entire case dismissed.

15 While the case was pending before the Fifth Circuit, defendant Todd settled with plaintiff. The settlement papers state that Frederick Todd is to be released from the lawsuit, with prejudice, and "[d]efendant Todd continues to deny all liability." Release Restricted as to Frederick Todd and the Alleged Insurance Carrier Colony Insurance Company, 2. The Fifth Circuit's and the District Court's Orders of Dismissal appear in the Appendix to the petition for certiorari at 82a-85a as "G" and "H," respectively. Consequently, we take issue with the claim that "Todd's liability under all three [above-referenced legal] theories has been established." Brief of the Petitioner at 6.

16 *See, e.g.*, S. Rep. 41, 42nd Cong., 2nd Sess. (1872) (Report on Conditions in the Late Insurrectionary States); S. Rep. 1, 42nd Cong., 1st Sess. (1871) (Report of the Select Committee to Investigate the Alleged Outrages in the South); H.R. Rep. No. 37, 41st Cong., 3rd Sess. (1871) (Report on Protection of Loyal and Peaceable Citizens in the South).

for ratification, was entitled "An Act to protect all persons in the United States in their civil rights and furnish the means of their vindication." S. 61, 39th Cong., 1st Sess. (1866), *reprinted in* Cong. Globe, 39th Cong., 1st Sess. (1866). The bill was introduced in the Senate on January 5, 1866.[17] Cong. Globe, 39th Cong., 1st Sess. 129 (1866) (herein this session will be cited as "Globe"). In the Senate, the legislation was managed by Senator Trumbull, the chairman of the Senate Judiciary Committee, who opened debate on January 12, 1866. *Id.* at 211. It passed the Senate by a vote of 33 to 12 on February 2, 1866, *id.* at 606-07, and was sent to the House. *Id.* at 626-27. House debate began on March 1st, *id.* at 1115, and the Act, as amended in the lower branch, passed, on March 13th, by a vote of 111 to 38. *Id.* at 1367. Three prominent Republicans voted "nay," Henry J. Raymond, publisher of the New York Times; Columbus Delano, a moderate from Ohio; and, most importantly, Ohioan John A. Bingham, a Radical Republican, and one of the most influential men in the 39th Congress. A. Bickel, *The Original Understanding and The Segregation Decision*, 69 Harv. L. Rev. 1, 20-22 (1955) (hereinafter cited as "*The Original Understanding*"). The Senate concurred in the amendments two days later. Globe at 1413-16. President Johnson vetoed the bill on March 27, 1866. *Id.* at 1679-81. The Senate overrode the veto, 33-15, on April 6th. *Id.* at 1809. The House, on April 9, 1866, voted the Act into law by a vote of 122 to 41, generating "an outburst of applause." *Id.* at 1861.

The Fourteenth Amendment was conceived in the Joint Committee to Look into the Condition of the States Which Formed the So-called Confederate States of America (the Joint Committee on Reconstruction) (popularly known as the "Committee of Fifteen"). The Committee was formed under the Joint Resolution of December 13, 1865. Globe at 6, 30, 46-47; *The Original Understanding* at 29-45. On April 30, 1866, Senator Fessenden in the upper chamber and Representative Stevens in the lower chamber introduced the Joint Committee's proposed

17 The Thirteenth Amendment was officially certified as adopted on December 18, 1865. 13 Stat. 774 (1865).

Constitutional Amendment, H.R. 127.[18] Globe at 2265, 2286. Debate started in the House on May 8th, *id.* at 2433, and in the Senate on May 23, 1866. *Id.* at 2764. On May 10th, the House, by a vote of 123-37, passed the joint resolution. H.R. 127

18 As originally written by Representative Bingham, the proposed resolution read: "The Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property." *Journal of the Joint Committee on Reconstruction*, 9, *reprinted as* S. Doc. No. 711, 63rd Cong., 3rd Sess. (1915); *see The Original Understanding* at 30; *see generally* H. Flack, *The Adoption of the Fourteenth Amendment* (1908); B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867* (1914); J. James, *The Framing of the Fourteenth Amendment* (1956). For a study of the ratification process in the states, *see generally* J. James, *The Ratification of the Fourteenth Amendment* (1984). This draft was edited in the Committee of Fifteen, which ultimately reported out the Bingham proposal, as H.R. 63, with one significant change. The phrase "to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property" had permutated to "secure to the citizens . . . all privileges and immunities of citizens in the several States, and to all persons in the several States the equal protection in the rights of life, liberty and property." Globe at 1033-34. After debate, however, the measure was postponed to a day certain, Globe at 1095, and never appeared again. Although this language did not prevail by itself, Bingham never gave up and, in a modified version, later saw his concept become a part of our Constitution.

When the Joint Committee began attempting to salvage something from the ignominious disappearance of its previous attempt to draft an acceptable amendment, *see* Report of the Joint Committee on Reconstruction XIV, H.R. Rep. 30, 39th Cong., 1st Sess. (1866), Representative Robert Owen put before it a proposal which, in section 5, stated that "Congress shall have power to enforce by appropriate legislation, [its] provisions. . . ." Representative Bingham, refusing to give up his language entirely, offered an amendment to this section. The substitute language is now a part of the Fourteenth Amendment:

> Sec. 5. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws

The Original Understanding at 42-43. Later the Committee moved this section to its rightful place in the proposal. By a vote of 10-3, it became section 1 of the Resolution introduced.

passed the Senate on June 8, 1866, *id.* at 3042, and was returned to the House for concurrence with Senate amendments. On June 13, 1866, by a vote of 120 to 32, the House concurred in the Senate's amendments and sent the Joint Resolution to the states for ratification. *Id.* at 3149.

The ratification of the Fourteenth Amendment allowed the Congress to take aim at the denial of civil rights in a manner not otherwise constitutionally possible. In reality, many in Congress had felt that Congress had exceeded its authority when it passed the Civil Rights Act of 1866 with only the Thirteenth Amendment as its sanction. Hence, the Enforcement Act of 1870, while pending before the Senate, was amended on motion of Senator Stewart to include language almost identical to the 1866 Act and to incorporate the previous civil rights law into the new legislation by reference. Cong. Globe, 41st Cong., 2d Sess. 3480 (1870). In the House, Representative Bingham reported a substitute bill on behalf of the Committee on the Judiciary on May 16, 1870, and with the rules suspended, obtained passage. Cong. Globe, 41st Cong., 2d Sess. 3503-04 (1870). It was the House bill which ultimately became law; however, the language was the Senate's. *Id.* at 3688-90, 3705, 3726, 3752, 3809, 3884 (1870).

In 1871, the Anti-Ku Klux Klan law was enacted. Ch. 22, 17 Stat. 13 (1871). *See generally* M. Walter, *The Ku Klux Klan Act and the State Action Requirement of the Fourteenth Amendment*, 58 Temp. L. Q. 3 (1985). It is by far the most important of the Reconstruction Period Civil Rights Acts adopted, since it gave birth to present day 42 U.S.C. § 1983. Its development began in the House, five days after President Grant called for legislation to control the turbulant conditions in the South, *see* Cong. Globe, 42nd Cong., 1st Sess. 244 (1871), when Representative Shellabarger, on behalf of the House Judiciary Committee, introduced a bill, H.R. 320, to enforce the new Amendment. H.R. 320, 42nd Cong., 1st Sess. (1871), *reprinted in id.* at app. 138. During debate, he outlined the legal effect of prior decisions upon the proposal. *Id.* at app. 68. Because of opposition even within his own party to the bill as introduced, Shellabarger amended it substantially, including the addition of

a civil remedy. *Id.* at 477. It passed the House April 6th on a vote of 118-91. *Id.* at 522.

In the Senate, debate opened with Senator Edmunds acting as floor manager on behalf of the Senate Judiciary Committee. *Id.* at 567. It passed the Senate on April 14, 1871, with a controversial amendment having been attached to it by Senator Sherman. *Id.* at 633, 704-05. The House voted down the bill with the Sherman amendment, 74-106, on April 19, 1871. *Id.* at 800. The amendment authorized a damage action against a municipality or county for damages incurred during a riot. Jurisdiction was placed in federal courts. The House stood firm in its refusal to adopt the Sherman amendment. Cong. Globe, 42nd Cong., 1st Sess. 801-05 (1871); *see especially*, *id.* at 804 (Remarks of Poland). After detaching the Sherman amendment in conference, the House voted in favor of the bill. *Id.* at 808. That same day, April 19, 1871, the Senate passed the bill, as amended, 36-13. *Id.* at 831.

The United States' statutes were revised and codified in 1874, when section 1981 appeared in its present form.[19] Commissioners were appointed to "bring together all statutes and parts of statutes which from similarity of subject ought to be brought together, omitting redundant or obsolete enactments" pursuant to Act of June 27, 1866, 14 Stat. 74. Due to the length of time it ultimately required to complete the task, the authorization statute was re-enacted. Act of May 4, 1870, ch. 72, 16 Stat. 96.

Introduction to Argument and to Summary of Argument

There are two questions presented by the petitions for certiorari. The first question is the major issue before the Court: Whether section 1981 liability may be imposed on a school district solely upon the doctrine of *respondeat superior*. The second question is whether the Fifth Circuit erred in not resolving

---

19 *See Runyon v. McCrary*, 427 U.S. 160, 168 n.8 (1976); *id.* at 195-97 (White, J., dissenting), for a short history of the Revisions as they apply to section 1981.

the question of who under Texas Law has "final policymaking authority," *Praprotnik*, ____ U.S. at ____, 108 S.Ct. at 924, 99 L.Ed. at 118, and dismissing the claims based upon *respondeat superior* as opposed to remanding the issue for determination by a jury.

To the extent that the second question is different from the first one, it is only a more general challenge to the *respondeat superior* problem. Accordingly, other than the law which is discussed in relation to the § 1981 issue, we do not intend to address separately the "question of state law" vis-a-vis section 1983 liability for the alleged denial of the First Amendment rights.

While the plaintiff and *amici* NAACP Legal Defense Fund and American Civil Liberties Union, and, to a lessor extent, the court of appeals, have framed this case in terms of the meaning of section 1981 and whether it requires proof of official policy, another—and more serious—issue is raised by the plaintiff's position that under 42 U.S.C § 1981 the doctrine of *respondeat superior* applies. That issue is whether section 1981 gives rise to an *independent*, **implied** right of action against a public entity or finds redress only through section 1983. *See Mahone v. Waddle*, 564 F.2d 1018, 1044 (3rd Cir. 1977), *cert. denied*, 438 U.S. 904 (1978) (Garth, J. dissenting) (hereinafter Judge Garth's dissent will be cited as "*Mahone*"). If an independent right of action against a state agency is not directly implied under § 1981, then *City of St. Louis v. Praprotnik*, ____ U.S. ____, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), is *stare decisis* and the doctrine of *respondeat superior* cannot be used to hold Dallas Independent School District *vicariously* liable. This, then, will be the first issue upon which we will focus.

Summary of Argument

This case presents the question under what circumstances a school district may be held liable under 42 U.S.C § 1981 for unconstitutional conduct allegedly attributable to its non-policymaking employees. *See Monell v. Department of Social Services*, 436 U.S. 658 (1977). Before reaching this issue,

though, the Court must determine if its recent pronouncements in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1988), and *City of St. Louis v. Praprotnik*, ____ U.S. ____, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), that municipal liability under 42 U.S.C. § 1983 cannot be predicated on the doctrine of *respondeat superior*, are *stare decisis*.

Section 1983 provides adequate support for one to bring an action against a school district and its employees for violations of constitutional and statutory rights. Of course, § 1983 is the means by which one obtains a cause of action against a municipality to protect the rights and privileges protected in § 1981. Likewise, section 1981 does not by its own language grant any cause of action; it only details substantive rights. Unless the Court wishes to create a direct, implied right of action outside the parameters of § 1983 against those acting under color of state law, *Monell* and its offspring prevent the *respondeat superior* doctrine from being used to hold defendant Dallas Independent School District vicariously liable to plaintiff for damages.

Even if there is an implied right of action when the defendant is a state actor, the legislative history of section 1981 prevents the use of *respondeat superior* as a means of obtaining a judgment against defendant. Section 1981 was, originally, a criminal statute and was not meant to include the doctrine of *respondeat superior* within its terms. Each Congress from 1866 through 1874, when the Reconstruction civil rights acts were being adopted or codified, believed that any legislation which attempted to use the doctrine of *respondeat superior* against a municipality would be unwise and unconstitutional. Fearing this, they did not pass any civil liability statute incorporating the theory. The rationale of *Monell* and the Court's other decisions in the area can lead to no other conclusion.

When a school district in good faith has adopted policies which are meant to prevent violations of employee's rights, it is fundamentally wrong to require it to answer in damages. Unless the district through its elected policymakers is a constitutional tortfeasor, its taxpayers should not be required to pay the piper.

ARGUMENT

I.

This Court's decision in *City of St. Louis v. Praprotnik*[20] Governs The Case

A. Scope of Review

The plaintiff attempts to succeed in this Court by the device of toppling over a straw man. He constructs his argument by stating that this cause is an action brought under the provisions of 42 U.S.C. § 1981. He then finds himself obtaining a reversal because, so the argument goes, section 1981 is the progeny of the Civil Rights Act of April 9, 1866, Ch. 31, 14 Stat. 27 (1866), and at the time it was enacted the doctrine of *respondeat superior* existed at common law. The straw man is the assertion that this action was "brought" under § 1981. Actually, the action was brought under the provisions of § 1983, *see Mahone*, 564 F.2d at 1037-38, and, therefore, the focus in this case to ascertain if a local government is subject to vicarious liability should be on § 1983, not § 1981.

A quick look at *Monell v. New York Department of Social Services*, 436 U.S. 658 (1978), reveals the accuracy of this proposition. After concluding in Part I of its opinion that municipalities are "persons" within the meaning of 42 U.S.C. § 1983, the *Monell* Court probed the wording and legislative history of section 1983 to decide if a local government could be held liable on a *respondeat superior* theory. The Court did not look at the legislative history or wording of the Fourteenth Amendment, *id.* at 691-95, the source of the rights being protected in the case, to make its decision. If, indeed, this case is an action at law or suit in equity brought pursuant to authority granted by § 1983 to seek redress for the deprivation of rights, privileges, or immunities secured by the Constitution and laws, and, in particular, section 1981, then this Court's decision in *City of St.*

20 ____ U.S. ____, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988).

Louis v. Praprotnik, ____ U.S. ____, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), governs.

The Court has found it necessary on several occasions, in the context of actions against **private** as opposed to public defendants, to decree that 42 U.S.C. § 1981 grants an independent, direct implied cause of action against one who deprives another of the rights and privileges granted by the present codification of the early civil rights statutes.[21] *See, e.g., Runyon v. McCrary*, 427 U.S. 160 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975); *see also, Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). However, in each of these cases, § 1983 was not available to the plaintiffs.

In this action, the plaintiff appears to have lost sight of elementary principles of statutory construction and assumes, without discussion or citation to authority, that he sued defendants, one a state agency, the other a person acting under color of state law, directly under section 1981. His premise may be correct; however, the Court has never implied such an action against a state agency and analysis of the cases involving implied rights of action would suggest that he is not.

The decision in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), certainly does not preclude this Court from looking at § 1981 in the circumstance of a state rather than a private actor. The case is as inapposite here as it was in *Brown v. Government Services Administration*, 425 U.S. 820, 833 (1976) (hereinafter cited as *GSA*). In *GSA*, the Court recognized that the holding in *Johnson* was limited to the "context of *private employment*." *Id.* Emphasis in original.

21 It is difficult, if not now impossible, nearly 125 years later, to determine the ancestry of current 42 U.S.C. § 1981. It probably finds its origin in the Act of May 31, 1870, ch. 114, 16 Stat. 144, although many commentators and jurists plainly disagree. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 168-69, 168n. 8 (1976). However, the net result of the enactment in 1866, the reenactment in 1870, and the codification in 1874 is a statute whose constitutional underpinnings have been lost to posterity. *Cf. id.* at 190 (Stevens, J., concurring); *id.* at 195-97, 195n. 6 (White, J., dissenting).

The Court has routinely held that § 1983 does not create any substantive rights; it simply furnishes the mechanism for obtaining redress for the deprivation of rights vested elsewhere. *Id.*; *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617-18 (1979); *Great American Federal Savings & Loan Assn. v. Novotny*, 442 U.S. 366, 381 (1979) (Stevens, J., concurring) (*dictum*).[22] On the other hand, section 1981, by its language, does not establish any remedy for its violation. It "merely" defines some of the rights and privileges of citizenship. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432 (1965); *Strauder v. West Virginia*, 100 U.S. 303, 312 (1879); *see* Cong. Globe, 39th Cong., 1st Sess. 474-75 (1866) (remarks of Senator Trumbull, the sponsor of the bill (S. No. 61) which became the Civil Rights Act of 1866) (Portions of the debates are reprinted in The Delaware Law School, *The Reconstruction Amendment Debates*, 121-22 (A. Avins, editor 2nd ed. 1974).

We recognize that many lower court judges have offhandedly assumed *sub silentio* the proposition that § 1981 grants an independent, implied right of action against *state* defendants, *but cf. Brown v. General Services Administration*, 425 U.S. 820 (1976) (denying the use of 42 U.S.C. § 1981 in federal employment litigation); *Cannon v. University of Chicago*, 441 U.S. 677, 725 (1978) (White, J., dissenting) (discussing an analagous situation); nonetheless, this does not prevent this Court from directly and thoroughly analyzing the proposition. *Thiboutot*, 448 U.S. at 31 (Powell, J., dissenting); *cf. Burks v. Lasker*, 441 U.S. 471, 476, 476n. 5 (1979). That a right of action has been implied for the private sector does not preclude consideration of whether an implied right exists in the public arena, especially since in *Thiboutot*, 448 U.S. at 4, the Court announced that "42 U.S.C. § 1983 provides a cause of action for state deprivations of 'rights secured' by 'the [statutory] laws' of the United States." *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 28 (1981). It is universally recognized, today, that

22 The Court ruled in *Daniels v. Williams*, 474 U.S. 327, 330 (1986), that "in any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right . . . ."

"[u]nder 42 U.S.C. § 1983 (1964 ed.) the [State] officers may be made to respond in damages . . . for violations of rights conferred by federal equal rights laws. . . ." *City of Greenwood v. Peacock*, 384 U.S. 808, 829 (1966). Indeed, in the state action context, the **only** reason to find an implied right would be to avoid the limitations which Congress grafted on to § 1983. *See National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458 (1974) (hereinafter cited as "*Passenger Corp.*"); *cf. Williams v. Bennett*, 689 F.2d 1370, 1390 (11th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983); *Dean v. Gladney*, 621 F.2d 1331, 1336 (5th Cir. 1980); *Carpenter v. City of Fort Wayne, Ind.*, 637 F. Supp. 889, 891-92 (N.D. Ind. 1986). Plus, when the lower courts have assumed that § 1981 grants an implied right of action against public defendants, the holdings are almost always *dicta* because § 1983 jurisdiction is also present.[23] For an assessment of an analogous situation, *see Cannon v. University of Chicago*, 441 U.S. 677, 722-23 (1978) (White, J., dissenting).

In addition, this Court, at least in *dicta*, has articulated the source of a section 1981 cause of action against state action. In *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979), the Court construed the scope of the civil rights-federal claim jurisdiction of the district courts. In the context of

23 An exception to this statement existed during the period from the handing down of *Monroe v. Pape*, 365 U.S. 167 (1961), until the rendering of the decision in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). *See, e.g., Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978).

Another exception is the decision rendered by the First Circuit in *Springer v. Seamen*, 821 F.2d 871 (1st Cir. 1987), but there, the implied right of action was more akin to one against a private employer, *see, Franchise Tax Bd. of Calif. v. United States Postal Service*, 467 U.S. 512, 520 (1984), and, since the action was against the Postal Service, a federally created entity, it could not involve state action or § 1983. Likewise, *District of Columbia v. Carter*, 409 U.S. 418 (1973), is inapplicable since the version of § 1983 before the Court did not apply to the District of Columbia. The most that can be said for the case is that it stands for the proposition that the Court will imply a cause of action under § 1981 when the Congress has not, by statute, developed one. *Compare Carter, with Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 395-97 (1971).

the issues before it, the Court was called upon to adjudicate the breadth of section 1983. In doing so, it described the parallel nature and common ancestry of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, and § 1983. The starting point from which the Court progressed in its examination was the statement that "[u]nlike the 1866 and 1870 Acts [Act of May 31, 1870, ch. 114, 16 Stat. 140], § 1 of the Civil Rights Act of 1871 did not provide for any substantive rights—equal or otherwise." *Id.* at 617. From this position, the Court recognized that the progenitor of § 1983 was enacted to enforce the "substantive protections afforded by § 1 of the 1866 Act." *Id.* (footnotes omitted). As Justice Powell points out in his concurring opinion, the Reviser of the Statutes in 1874[24] "believed that § 1 of the 1866 Act, to the extent it protected against deprivations under color of state law, was meant to be fully encompassed by the phrase 'rights . . . secured by the Constitution,' in § 1 of the 1871 Act." 441 U.S. at 633 (Powell, J., concurring). And, concluded Justice Powell, the Commissioners' note dealing with federal court jurisdiction demonstrates graphically that Congress meant for the "particularly described rights of §§ 1977 and 1978 [to be] protected against deprivation under color of state law by the

24 Section 1983 first appeared in its present form in the Revised Statutes of 1874 as § 1979. Pursuant to the Act of June 27, 1866, three Commissioners were appointed to attempt to codify all federal statutes. Later, their work was examined by an attorney, Thomas Jefferson Durant, to insure that the proposed revision met the intent of the Congress that the revision should not substantively change current law.

Section 1979 was itself derived from § 1 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13. Under the "Ku Klux Klan" Act, as the Civil Rights Act of 1871 is commonly called, the civil cause of action protected only against deprivations, under color of state law, of rights "secured by the Constitution." However, the phrase "secured by the Constitution" includes the rights, privileges, or immunities granted by the 1866 Civil Rights Act since, in passing the 1866 Act, Congress was simply defining the privileges of citizenship guaranteed by the Constitution and in particular the Thirteenth Amendment. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 633n.14 (1979) (Powell, J., concurring).

words 'rights . . . secured by the Constitution' in § 1979." *Id.* at 636.[25]

A study of the relationship between § 1981 and § 1983 reveals that, from the time that "any person" was first authorized by Congress to sue in federal court to enforce his or her Constitutional rights as defined, in part, by the 1866 Act, Congress' understanding was that the mechanism creating the cause of action would be § 1983 or one of its predecessors.[26] Unless the Court **now** creates a cause of action separate and apart from the one which Congress created, the Court's previous rulings involving *respondeat superior* and § 1983 are *stare decisis*. Accordingly, we turn our attention to the subject of whether the Court should imply a direct, independent cause of action against a municipality from § 1981.

B. Implied Actions

Section 1981 reads as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evi-

25 During the debates over the Civil Rights Act of 1871, Representative Shellabarger emphasized that Section 1 provides a civil remedy for people "where, under color of law, they or any of them may be deprived of rights to which they are entitled . . . by reason and virtue of their national citizenship." Cong. Globe, 42nd Cong., 1st Sess. App. 68 (1871). Moreover, he defended the 1871 Act's constitutionality by remarking that the first section of the bill, patterned upon the second section of the 1866 Act, was simply another means of enforcement. *Id.* Senator Thurman depicted the anticipated law as "relating wholly to civil suits . . . . Its whole effect is to give to the federal judiciary that which does not now belong to it . . . . It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal Courts . . . ." Cong. Globe, 42nd Cong., 1st Sess. App. 216-17 (1871).

26 "[I]t must be remembered," that at the time the Civil Rights Act of 1866 was adopted, "there existed no general federal-question jurisdiction in the lower federal courts." *District of Columbia v. Carter*, 409 U.S. at 427.

> dence, and to the full and equal benefit of all laws and proceedings for the security of white persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The statute does not, as one can plainly see, explicitly sanction a private right of action by a person injured by a denial of any of the rights, privileges, or immunities guaranteed by its terms. *See Passenger Corp.*, 414 U.S. at 456. Moreover, assuming that the predecessor to § 1981 was the Civil Rights Act of 1866, the remedy by which Congress chose to enforce its terms was criminal liability.[27]

An analysis of whether § 1981 contains an implied remedy when the defendant is a public entity starts with the ruling in *Cort v. Ash*, 422 U.S. 66 (1975). Although *Cort* was not the first case to deal with the doctrine of an implied right of action from a federal statute, it is the seminal decision in the area. *Cort* requires an inquiry into the factors which are indicative of the legislative will. Of course, legislative intent is not the *sine qua non*; if the Congress truly intended for a right of action to exist it would have said it in clear and unmistakable language. Rather, the inquiry is to determine if the Court should create the cause of action in an attempt to further Congressional policy.

---

27 Likewise, assuming that the source of § 1981 is the Enforcement Act of 1870, ch. 114, 16 Stat. 140, the prescription Congress used to enforce the Act's terms was, nevertheless, criminal. This did not change until 1871 with the passage of the Ku Klux Klan Act, ch. 114, 17 Stat. 13 (April 20, 1871). Of course, the result in this case does not vary with a determination that § 1981 stems from the Enforcement Act or, for that matter, any later enacted Reconstruction Civil Rights Act, although the determination would make § 1981 a Fourteenth Amendment statute, not a Thirteenth.

At the time that § 1981 was adopted there was no federal question jurisdiction in the lower federal courts. Hence, Congress, up until it passed § 1983, relied upon " 'the state courts to vindicate essential rights arising under the Constitution and federal laws.' *Zwickler v. Koota*, 389 U.S. 241, 245 (1967)." *District of Columbia v. Carter*, 409 U.S. 418, 427 (1973).

In deducing whether a private remedy is suggested by a particular act where the right of action is not announced, several elements apply. *See generally* Comment, *Implied Private Rights of Action: The Courts Search for Limitations in a Confused Area of the Law*, 13 Cumb. L. Rev. 569 (1983); *Private Causes of Actions From Federal Statutes: A Strict Standard for Implication By Sole Reliance on Legislative Intent*, 14 U. Rich. L. Rev. 605 (1980) (hereinafter *Private Causes of Action*). Foremost may be the requirement that the plaintiff be "one of the class for whose especial benefit the statute was enacted." *Texas & Pacific R.R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916). This ingredient is basic, since, if the person is not within the class for whom the statute was meant to favor, the case need not proceed further regardless of Congressional design. Here, this criteria is a given. It is now well established that section 1981 was adopted to protect all citizens, not just blacks, in their citizenship rights. We gladly concede the point and move on to the succeeding essential factor.

The next area of inquiry under the *Cort* formulation is the question of legislative history. 422 U.S. at 78. According to *Cort*, one must resolve whether there is any sign of legislative intent, explicit or implicit, either to create such a remedy or to deny one. Here, we are on firm ground in stating that at the time of the adoption of the 1866 Civil Rights Act, the intent was not to create a private right of action. To begin with, it is without question that the 39th Congress doubted its constitutional authority to pass legislation allowing for actions for violations of civil rights. *See Hurd v. Hodge*, 334 U.S. 24, 32-33 (1948). In introducing the proposal which was to thereafter become the Fourteenth Amendment, on February 26, 1866, only days before the 1866 Civil Rights Act would be enacted, Representative Bingham[28] stressed that it "has been the want of the Repub-

---

28 Representative Bingham, a Radical Republican, voted against the Civil Rights Act of 1866 since he felt that, even as narrowly written as it was, the planned law was unconstitutional. *See* Cong. Globe, 39th Cong., 1st Sess. 1291-92 (1866) (Statement of Bingham). It was for this reason that he introduced the Joint Resolution which became the Fourteenth Amendment. Cong. Globe, 39th Cong., 1st Sess. 1033 (1866) (Introduction of H.R. 63).

lic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to those requirements [the privileges and immunities portion of the second section of the fourth article] of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 1034 (1866). Given the intense debate in Congress over constitutional authority to pass the Civil Rights Bill, even in its pristine form, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1291-92 (Statement of Bingham); *id.* at 2896 (Statement of Doolittle), it is doubtful, at best, that Congress would have tried to expand its coverage to allow direct damage actions. Such an idea had to await the passage of the Fourteenth Amendment and was the impetus for the Amendment's introduction.

More to the point, on March 8, 1866, one of the foremost supporters of civil rights, Representative Bingham, the father of the Fourteenth Amendment, moved to amend a motion to recommit S. No. 61, the legislation which ultimately became the Civil Rights Act of 1866, as follows:

> I move to amend the motion . . . by adding the following:
>
> With instructions to strike out of the first section the words "and there shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States on account of race, color, or previous condition of slavery," and insert in the thirteenth line of the first section, after the word "right" the words "in every State and Territory of the United States." *Also to strike out all parts of said bill which are penal, and which authorize criminal proceedings, and in lieu thereof to give to all citizens* injured by denial or violation of any of the other rights secured or protected by said act *an action in the United States courts* with double costs in all cases of recovery, without regard to the amount of damages; . . . .

Cong. Globe, 39th Cong., 1st Sess. 1271-72 (March 8, 1866) (emphasis added). The motion died on the legislation's floor manager's demand for the previous question, 53-45. *Id.* Incontrovertibly, the Congress spoke and its intent cannot be mistaken; it rejected the right to a damage action, opting instead for penal provisions.[29] The rejection of Bingham's amendment and the retention of criminal penalties in the Act of 1866, despite strong arguments about the injustice of criminal liability, compellingly demonstrates that the Congress in 1866 grappled with the availability of a right of action to enforce section 1 and explicitly rejected it. The refusal to adopt the Bingham amendment rejected any concept of *respondeat superior*.

In explaining the intent of the proposal to the Congress, Senator Trumbull remarked that the entire proposal was directed only at persons who act under color of state law. Cong. Globe, 39th Cong., 1st Sess. 1758 (1866). Although Senator Trumbull was talking about section 2 of the bill, his commentary is applicable to the entire legislation since he prefaced his theme by saying: "[I]n my judgment . . . this second section . . . is the vital part of the bill," and "[w]ithout it, it would scarcely be worth the paper on which the bill is written." *Id.* He further explained that section 1 granted only privileges and rights but otherwise has "no consequence."[30] *Id.* Earlier, when he introduced S. 61,

---

29 In light of the graphic legislative history rejecting a right of action, it is hard to comprehend *Runyon v. McCrary*, 427 U.S. 160 (1976). However, the Court has signaled that it, too, questions the validity of *Runyon*. *Cf. Patterson v. McLean Credit Union*, No. 87-107 (Order of April 25, 1987). Even if *Runyon* is reaffirmed, it does not invalidate the argument which respondent is making. The fact that this Court has found that a private sector cause of action furthers Congressional policy does not establish the necessity of going around the Congressional will by finding a public sector right of action outside of § 1983. Section 1983 is the means which the Congress authorized for suing public institutions; an implied right is therefore unnecessary. The statutory provision for one form of proceeding normally precludes implying an intent by the Congress that another form of enforcement is warranted. *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453 (1974).

30 Justice Harlan quoted Trumbull's statements as to the intent of the legislation, thusly: "It will have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race. It will have no operation in the State of Ken-

he divulged that, while section 1 defines the rights of all persons, "[t]he other provisions of the bill contain the necessary machinery to give [the rights] effect." *Id.* at 474. The machinery being, of course the criminal sanctions. In explaining why he was voting for the bill, Senator Stewart stated: "He must do it under the color of the law. If there is no law or custom in existence in a State authorizing it, it will be impossible for him to do it under color of any law." Cong. Globe, 39th Cong., 1st Sess. 1785 (1866). *See also id.*, at 2511 (Remarks of Eliot); *id.* at 1294 (Remarks of Shellabarger) (a lawyer). Accordingly, from the time of its adoption, the 1866 Act was considered to be controlled by section 2, the criminal provision.

The later Reconstruction Congresses also viewed the 1866 Act as limited to a criminal remedy, as opposed to granting a civil rights' cause of action for damages. Hence, in 1870 and, especially in 1871, Congress moved to fill the vacuum created by the lack of private enforcement provisions contained in the 1866 Civil Rights Act.[31] In 1870, after the adoption of the Four-

teenth Amendment, the 41st Congress reenacted the criminal portion of the 1866 Act (presently 18 U.S.C. § 242) basing its power on the newly enacted Amendment. It also added what is presently 18 U.S.C. § 241, reaching private conspiracies which interfere with civil rights. The debates uncloak the intention of the drafters of the earlier Civil Rights Act. The remarks of Senator Pool of North Carolina, for example, present the view that the Civil Rights Act was solely to be enforced as a criminal statute. Cong. Globe, 41st Cong., 2nd Sess. 3611 (1870).

Even a cursory review of the legislative history of the 1871 Act shows that the opponents of the proposed law were bristling over the break from old constitutional theories by the granting of a private cause of action for damages. Representative McHenry summarized the fear best, asserting that the bill would "rob" the states' tribunals of their rightful jurisdiction "by a power of the Federal Government . . . so flagrant that the people will hold to a strict accountability those men . . . who perpetrate the outrage." Cong. Globe, 42nd Cong., 1st

---

tucky when her slave code and all her laws discriminating between persons on account of race or color shall be abolished." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 459 (1968), *quoting* Cong. Globe, 39th Cong., 1st Sess. 476 (1866). This quote, like the other remarks quoted in the text, indicates Congress' intent to limit the 1866 Act's scope to laws, policies, and customs of governments.

31 The 1866 Act contains language that one might construe as allowing a private right of action in the federal courts. Section 3 states in part that "the district courts . . . shall have . . . cognizance . . . of all causes, *civil* and criminal, affecting persons who are denied . . . any of the rights secured to them by the first section of this act . . . ." Emphasis added. However, a close reading of the provision, with an eye on the phrases surrounding the clause, along with consideration of the problem being addressed by the 39th Congress, leads to the inescapable conclusion that the design was meant to allow a person to bring a state law claim into the federal courts when some state requirement precluded it from being litigated in the local system. The Congress was chiefly concerned with old "Slave Codes" and the quasi-slave "Black Codes" which prevented the newly freed Americans from testifying in cases involving whites. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess., at 39, 474, 516-17, 602-03, 1123-25, 1151-53, 1160 (1866); *see generally* S. Exec. Doc. No. 6, 39th Cong., 2nd Sess. The provision meant to allow, for example, blacks to sue whites in federal court for breach of contract, action of ejectment or negligence. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 602-03 (1866) (Statement of Senator Lane); Cong. Globe, 39th Cong., 1st Sess. 604-05 (1866) (Statement of Senator Trumbull); Cong. Globe, 39th Cong., 1st Sess. 630 (Statement of Rep. Hubbard) (The blacks "are not permitted to sue in the courts or testify against a white man"); Cong. Globe, 39th Cong., 1st Sess. 1159-60 (1866) (Statement of Senator Windom). *See generally* E. McPherson, *The Political History of the United States of America During the Period of Reconstruction* 29-44 (1871); Readers Guide, *Reconstruction Debates* at vi-xiv. This reading of the statute is forcefully supported by later attempts by Senator Sawyer to amend the Act to insure that it achieved its goal. *See, e.g.*, S.B. 715, 41st Cong., 2nd Sess. (1871) ("[i]t being the true intent and meaning of the act to which this is supplementary [Civil Rights Act of 1866] to have the same law administered in the Courts of the United States to the persons denied the right secured to them by said act and is administered in the courts of record of the State to persons not denied these rights . . . ."). For another version of the purpose of this clause, see *Mahone*, 564 F.2d at 1044-47 (although Judge Garth's view is plausible, we believe that our interpretation is the correct one).

Sess. 429 (1871). Even discounting the obvious hyperbole, the speech displays the novelty in 1871, five years after the passage of the Civil Rights Act, of the remedy section 1 was about to grant.

Of course, even on the Republican side, the understanding was that the Civil Rights Act of 1866 would not be enforced by a damage action. In explaining the Ku Klux Klan bill in the House, the floor manager, Representative Shellabarger, who served in Congress in 1866, opened debate on the 1871 Civil Rights Act by analogizing the bill to the 1866 law. He noted that the bill before Congress was patterned on the Civil Rights Act of 1866; but, he continued, whereas the 1866 Act was only criminal, the proposal before the House provides for a "civil remedy." Cong. Globe, 42nd Cong., 1st Sess. app. 68 (1871).[32]

Representative Blair, who is quoted in *Monell*, 436 U.S. at 673, explained, during the debates on the Sherman Amendment:

> The proposition known as the Sherman amendment . . . is entirely new. It is altogether without a precedent in this

32 After reading the first section of the bill, Mr. Shellabarger justifies it by arguing:

> The model for it will be found in the second section of the act of April 9, 1866, known as the "civil rights act." That section provides a criminal proceeding in identically the same case as this one provides a civil remedy for, except that the deprivation under color of State law must, under the civil rights act, have been on account of race, color, or former slavery. This section of this bill, *on the same state of facts*, not only provides a civil remedy . . . to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship.

Cong. Globe, 42nd Cong., 1st Sess. app. 68 (1871) (Statement of Shellabarger). Emphasis added. Thus, the Ku Klux Klan Act was the first effort to "afford a federal right in federal courts [to litigate] . . . claims of citizens to the enjoyment of [the] rights, privileges and immunities," *Monroe v. Pape*, 365 U.S. 167, 180 (1961), defined in the Civil Rights Act of 1866.

> country. . . . [The Amendment] lay[s] . . . obligations . . . upon the municipalities.
>
> [I]t is proposed . . . *to create that obligation* . . . .

Cong. Globe, 42nd Cong., 1st Sess. 795 (1871). Emphasis added. Of course, if a civil cause of action allowing municipal liability under the doctrine of *respondeat superior* had been introduced with the 1866 Act, the proposition would hardly have been "without a precedent."

The few federal cases decided between the time of the adoption of the 1866 Act and the civil enforcement provisions in 1871 reflect Congress' intent that section 1 was to be enforced only as a criminal statute or by writ of habeas corpus. *See United States v. Rhodes*, 27 Fed. Cas. 785 (No. 16,151) (C.C.D. Ky. 1866); *In re Turner*, 24 Fed. Cas. 337 (No. 14,247) (C.C.D. Md. 1867). The act was never used during that period, to our knowledge, by any member of a protected class to enforce § 1 by means of a civil damage action in the federal courts. *Mahone*, 564 F.2d at 1040.

The draft of the proposed Revised Statutes also supports the view that § 1983 was meant to provide all deprivations mentioned in § 1981 and was to be the source of civil actions vindicating the rights granted. While there wasn't any note accompanying the chapter on Civil Rights, an extensive note was written regarding the jurisdiction of the federal courts to redress deprivations of rights secured by the Constitution and laws. 1 Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose, Title XIV, Ch. 7, 359-63 (1872). The note follows the proposed jurisdictional statement for the Circuit Courts,[33] and makes clear that the pro-

33 The proposed jurisdictional provision reads, in part, as follows:

> 15. Of all suits authorized by law to be brought by any person to redress the deprivation, under *color of any law, statute, ordinance, regulation, custom or usage of any State*, of any right, privilege, or immunity, secured by the Constitution of the United States, or *of*

vision is to enforce the Act of 1866, the Act of 1870, and the Act of 1871. In actuality, the marginal note makes this unmistakable.

> Suits to redress deprivation of rights secured by the Constitution and laws to persons within jurisdiction of United States.

---

20 April 1871, ch. 22 § 1, vol. 17, p.13
31 May 1870, ch. 114 §§ 16, 18, vol. 16, p. 114
9 April 1866, ch. 31 § 3, vol. 14, p. 27

Id. at 359. The following note only serves to strengthen the salient meaning of the marginal note:

> It may have been the intention of Congress to provide, by this enactment [Civil Rights Act of 1871], for all the cases of deprivations mentioned in the previous act of 1870, and thus actually to supersede the indefinite provision contained in that act. But as it might perhaps be held that only such rights as are specifically secured by the Constitution, and not every right secured by a law authorized by the Constitution, were here intended, it is deemed safer to add a reference to the *civil rights act*.

Id. at 362. Emphasis added.

In light of the jurisdictional provision and the accompanying notes, it is ludicrous to try to distinguish *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) (hereinafter cited as *Monell*), on the grounds that § 1983 includes the "Any person who . . . shall subject, or cause to be subjected" language, although § 1981 does not. *See* Brief of Respondent at 12-13. The language used in § 1981 may be different than that used in § 1983, however, the intention is the same. Section 1981

> any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

Emphasis added.

was meant to come within the umbrella of § 1983 and was believed by the Revisors in 1872, only a few years after the several acts were adopted, to be co-extensive with it, not expansive.

Justice White persuasively argued in his dissent in *Runyon v. McCrary*, 427 U.S. 160, 195 (White, J., dissenting), that the plain language of 42 U.S.C. § 1981 does not allow an implied right of action against private individuals and that the statute in its present form is completely based on the authority of the Fourteenth Amendment, which controls "state action." *Id.* at 201-02. Although he did not carry the day in *Runyon*, his views were certainly not rejected by all members of the Court. *See id.* at 186 (Powell, J., concurring); *id.* at 189 (Stevens, J., concurring). Moreover, the legislative history leaves "no doubt" that the construction of § 1981 in *Runyon* "would have amazed the legislators who voted for it." *Id.* at 189 (Stevens, J., concurring). In any event, if *Runyon* is overruled and does not imply any direct, right of action to enforce the rights, privileges, or immunities granted by § 1981, the Fifth Circuit must be sustained as then clearly § 1983 will be the only vehicle creating a right of action against a school district. If *Runyon* is sustained and is held to allow a direct right of action against a private entity, the decision will not effect this litigation. The Court will still be called upon to determine if it should imply an action, independent of § 1983, against public agencies. Certainly, it would not be appropriate to imply an action here when § 1983 is already available for persons deprived of their rights by state action. Congress' action in adopting § 1983, by itself, says how they intended civil rights actions to be brought against municipalities. If Congress had wanted civil rights actions to be broader than now allowed under § 1983, the legislation adopting § 1981 would have provided for it.

In *Cort*, it was acknowledged that "an explicit purpose to *deny* such cause of action would be controlling." 422 U.S. at 82 (emphasis added). Where the legislature rejects a cause of action for damages, a private right of action against state entities cannot be presumed. This view is strengthened by the Court's recognition that the Congress, not the Court, is the proper body to be devising legislation, *cf.*, *e.g.*, *National Rail-*

road Passenger Corp. v. National Assn. of Railroad Passengers, 414 U.S. 453 (1974); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Piper v. Chris-Craft Industries*, 430 U.S. 1 (1977) and that a "strict approach" to developing implied rights of action is required, *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1978), by the separation of powers doctrine. *See Private Causes of Action*, *supra* at 619. With these perspectives in mind, Justice, now Chief Justice, Rehnquist, cautioned that "[n]ot only is it 'far better' for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch." *Id.* at 718. "The creation of private causes of actions," according to Justice Powell, "is a legislative function" and the "federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction." *Id.* at 730-31 (Powell, J., dissenting).

The most potent reason why this Court should not imply an independent, direct cause of action comes from *Cort*'s third precept: "[U]nder *Cort*, a private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme." 441 U.S. at 677. Here, the Congress devised a scheme whereby one could sue to enforce their statutory and constitutional rights. This formula is embodied in section 1983. The scheme, however, has certain restrictions, one of which is that the actor function under color of state law. Section 1983 also requires that a state institution only be subject to liability when its policies create the deprivation and bestows upon defendants a qualified immunity. "It would wholly frustrate explicit congressional intent to hold that the [plaintiff] . . . could evade [these] requirement[s] by the simple expedient of putting a different label on [his] pleadings," to quote this Court's opinion on a different but analogous topic. *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973).

It is only when the statute granting the privilege has "no other remedy to redress [the] violations of the statute" that a

private remedy will be inferred. 441 U.S. at 728 (White, J., dissenting); *see also Great American Federal Savings & Loan Assn v. Novotny*, 442 U.S. 366 (1979). The Court has often, if not consistently, refused to create a private right of action if Congress has provided some other means of protecting the privileges. 441 U.S. at 735 (Powell, J., dissenting); *see also Switchmen v. National Mediation Board*, 320 U.S. 297, 300-01 (1943). "Where a statutory scheme expressly provides for an alternative mechanism for enforcing the rights and duties created," Justice Powell warns, the Court should "be especially reluctant ever to permit a federal court to volunteer its services for enforcement purposes." 441 U.S. at 748; *see also Passenger Corp.*, 414 U.S. at 458. A warning which in the context of this case should be obeyed.[34] Moreover, in a variety of situations, including at least one involving the 1866 Act, the Court has held that a precisely drawn, detailed statute preempts more general remedies." *GSA*, 425 U.S. at 834; *see also Preiser v. Rodriguez*, 411 U.S. at 489-90.

C. *Respondeat Superior*

As previously stated, if this Court does not imply a direct, independent cause of action under § 1981, the question becomes solely one of *stare decisis*: Do the past precedents of the Court apply to the facts of this case? The answer, of course, is a resounding, "YES!."

---

34 Some might argue that the Civil Rights Act of 1866 granted, in section 3, a cause of action and that it did not require state action as a prerequisite to come into the federal system. *See supra* note 30. Accepting this as true, *arguendo*, the argument goes nowhere. If Congress saw fit to establish a cause of action in 1866 which did not require state action, it was free in 1871, with the adoption of the Klu Klux Klan Act, and, too, with the Revision in 1874 to narrow the scope of the right to sue for damages and require the deprivation to have occurred under color of state law. In any event, if a private right of action was granted in the '66 Civil Rights Act, it would have been limited, no doubt, by section 2 of the act, as it is now by § 1983, to claims of deprivations of rights under color of "any law, statute, ordinance, regulation, or custom." *Cf. The Civil Rights Cases*, 109 U.S. 3, 16-17 (1883); *Jones*, 392 U.S. at 454 (Harlan, J., dissenting).

In *Praprotnik*, ____ U.S. ____, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), Justice O'Connor undertook to define the parameters of the Court's prior decisions concerning when a decision by a municipal officer or employee may expose the municipality itself to vicarious liability under section 1983.[35] The Court defined the legal standard against the backdrop of an employee who was laid off from his professional position with St. Louis after successfully appealing a suspension for cause to the city's Civil Service Commission. The employee believed, and a jury found, that the city had violated his First Amendment rights. The jury exonerated each of the individual defendants.

On appeal, the verdict against the city was affirmed since the court felt that the jury's verdict absolving the individual defendants could be harmonized with the finding of liability against the city. The appellate court reconciled the apparent conflict between the jury's findings on the grounds that " 'the named defendants were not the supervisors directly causing the layoff, when the actual damages arose.' " *Id.* at 921, *quoting from* 798 F.2d 1168, 1173n. 3 (8th Cir. 1986). Based upon this holding, the Eighth Circuit sustained the jury's implicit finding that the layoff was brought about by a city policy.

It is important to understand what the circuit ruled before discussing the Court's reversal since it has such a strong bearing upon the current proceeding. The Eight Circuit found that the employee's layoff was brought about by an unconstitutional city policy. Furthermore, the court of appeals concluded that the city could be held liable for the adverse personnel decisions taken by the employee's supervisors since, according to the appellate court, a "policymaker" is one whose employment decisions are "final" in the sense that they are not subject to *de novo* review by higher ranking officials. 798 F.2d 1168, 1173-75 (8th Cir. 1986).

This Court initiated its scrutiny by outlining the previous history surrounding municipal liability for violations of civil rights, beginning with its overruling of *Monroe v. Pape*, 365

35 The constitutional principles applied to "municipalities" also apply to school districts.

U.S. 167 (1961), in the case of *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). *Monell*, of course, held that a municipality was a "person" within the meaning of § 1983. The decision went on to announce, however, that a city could not be found vicariously liable by the use of the doctrine of *respondeat superior*. Municipalities can only be held liable when the injury is inflicted by a government's "lawmakers or by those whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694. According to the *Monell* Court, a city can only be held liable for *its own acts*. This holding was based on the Court's reading of the language of § 1983 in light of the Act's legislative history. 436 U.S. at 691-93. The ruling is consistent with this Court's requirement that factual causation be a predicate for constitutional tort liability, *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274 (1977); *Givhan v. Western Line Consolid. Sch. Dist.*, 439 U.S. 410 (1979); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24, 824n. 8 (1985); *Martinez v. California*, 444 U.S. 277 (1980), and with the "intention" requirements of cases like *Washington v. Davis*, 426 U.S. 229 (1976), and *General Building Contractors Assn. v. Pennsylvania*, 458 U.S. 375 (1982) ("We conclude, therefore, that § 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination." *Id.* at 391); *see also Griffin v. Breckenridge*, 403 U.S. 88 (1971).

After establishing these primary guideposts, the *Praprotnik* Court "reiterated that the identification of policymaking officials is a question of state law." *Praprotnik*, 108 S.Ct. at 924; *see also Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion). As a consequence, the identification of policymaking officials is not a question of federal law and **is not**, the Court emphasized, a fact question. *Id.* at 924. When presented with a civil rights claim against a municipality, a trial court, or, if necessary, a court of appeals, need look only to the laws of the state (which can include valid local ordinances and regulations) to determine whether a person is a policymaker. Under the precedents canvassed by the Court, a municipality or other governmental agency may not be held liable unless the munici-

pality itself is the constitutional tortfeasor. That is, acts which the municipality has actually ordered by custom or policy must be the source of the constitutional injury. Hence, the resolution that "[w]hen an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Id.* at 926. The actions of the Board of Trustees and the General Superintendent fall squarely within the parameters of this holding. DISD can only operate through its agents and employees; it is its administrators who are delegated the authority to conduct the school district's day-to-day business. However, the Board of Trustees limits that delegation by passing policies whose purpose is to govern how its administrators are to use the delegated discretion. It is those policies which subject the district to liability; not the actions of an administrator acting contrary to those policies or in making discrete decisions within the scope of legal, non-discriminatory policies. *Cf. City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

In the case at bar, the Fifth Circuit refused to examine the law of the State of Texas and apply *Praprotnik* to this case. Had it done so, it would have dismissed the claims against Dallas Independent School District because the responsibilities of the General Superintendent under state law are precise: The General Superintendent is an administrator, governed by the rules, regulations and by-laws of the Board of Trustees; he is not a policy-maker. In fact, the plaintiff introduced sufficient policies which governed the Superintendent's actions in transferring Jett that the proposition is incontestable.[36] Plaintiff has

36 Because of the various school district policies already discussed, *Pembaur* requires that the issue of the status of the General Superintendent of the Dallas Independent School District be resolved in defendant's favor. The General Superintendent is not a policymaker. In addition, state law precludes him from becoming one. Tex. Educ. Code § 23.01 states that "The public schools of an independent school district shall be under the control and management of a board of . . . trustees." Furthermore, state law establishes that these "trustees shall have the ***exclusive*** power to manage and govern the public free schools

put forth—and certainly the Fifth Circuit found—no evidence which would show that any policy of the Dallas Independent School District violated any of his constitutional rights. Neither can he provide any evidence that the members of the Board of Trustees acted in any way to deprive him of his constitutional rights. In reality, he proved the opposite by introducing policies which were meant to protect employees from racial discrimination and which guaranteed due process upon an involuntary transfer.

Praprotnik applies because this is, quite simply, a § 1983 case, not a direct action under § 1981, and accordingly the precedent is *stare decisis*. The rights to be protected most assuredly come from § 1981; nevertheless, the cause of action comes from § 1983.

II.

Respondeat Superior Is Not a Legally Valid Basis for Imposing Liability on the Dallas Independent School District Under 42 U.S.C. § 1981.

In 1978, the Court probed the applicability of *respondeat superior* in a case which arose under section 1983 to enforce rights which were granted by the Fourteenth Amendment's Equal Protection clause to the plaintiffs, women who were forced to take illegal, unpaid pregnancy medical leaves. In the resolution of that case, the Court held that:

> [T]he language of § 1983, read against the background of [its] legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless [municipal] action . . . caused a constitutional tort. In

of the district," Tex. Educ. Code § 23.26(b) (emphasis added), and "may adopt such rules, regulations, and by-laws as they may deem proper." *Id.* at § 23.26(d). The General Superintendent, unlike a member of the Board of Trustees, is "the educational leader and the *administrative manager* of the school district." *Id.* at § 13.351. Emphasis added.

> particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.

Monell, 436 U.S. at 691. Emphasis in original.

The Court has several times since *Monell* reaffirmed the conclusion that *respondeat superior* does not support municipal liability and that an agency of the state may be held liable only for its own constitutional violations. *Praprotnik*; *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). Each of these cases was buttressed by § 1983. Hence, as to litigation brought under the umbrella of § 1983, the question as to municipal responsibility via the doctrine of *respondeat superior* is not open.[37] And, while *Monell* was decided under § 1983, it applies with equal validity here, even if a direct, implied cause of action is found to exist under § 1981 in spite of § 1983's applicability to the school district.

To impose municipal liability on a *respondeat superior* theory simply because the case seeks to vindicate § 1981 rights would be incompatible with the *Monell* Court's logic. Although the Court braced its decision on the specific wording of section 1983, the language of the act was not the only foundation upon which the Court built. *See City of Oklahoma City v. Tuttle*, 471 U.S. at 817-18; *Pembaur*, 475 U.S. at 478-79.[38] *Monell* recognizes that in passing the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, Congress avoided "creation of a federal law of *respon-*

37 Since *Monell*, the question has arisen in several lower courts as to whether the *respondeat superior* theory may be applied to § 1981. *E.g.*, *Jett v. Dallas Independent School District*, 798 F.2d 748 (5th Cir. 1986), *on motion for rehearing*, 837 F.2d 1244 (5th Cir. 1988); *Springer v. Seamen*, 821 F.2d 871 (1st Cir. 1987); *Leonard v. City of Frankfort Electric and Water Plant Board*, 752 F.2d 189 (6th Cir. 1985) (*dicta*).

38 Justice Brennan maintains that the wording of § 1983 is not the primary source for *Monell*'s conclusion that *respondeat superior* liability cannot be imposed on government bodies for deprivations of civil liberties. Rather, the conclusion rests "[p]rimarily" according to his opinion in *Pembaur*, "upon the legislative history." 475 U.S. at 479.

> *deat superior* [because it] would have raised all the constitutional problems associated with the obligation to keep the peace . . . ." *Id.* at 693. Certainly if § 1983's framers were apprehensive about a constitutional impediment to *respondeat superior* liability in the Civil Rights Act of 1871, *see Monell*, 436 U.S. at 692 n. 57, after the passage of the Fourteenth Amendment, the same fear was, most assuredly, present when the 39th Congress adopted the 1866 Act. *Cf. id.* at 694. Moreover, had the earlier act contemplated vicarious liability, it is safe to assume that the Sherman amendment's[39] supports would have used it in debate.

Monell speaks of constitutional torts, *id.* at 691, not of § 1983 torts. To the extent that § 1981 defines the limits of the rights, privileges, or immunities of citizenship, a violation of the provision creates a constitutional tort. Moreover, we can discern no legitimate reason why one who sues to protect Constitutional rights, as, for example, First Amendment freedoms, or, like in *Monell*, Fourteenth Amendment equal protection of the laws, should be denied the use of *respondeat superior* whereas a person who sues to protect a statutory right can utilize the doctrine. It seems that we are putting the wrong foot forward when we make statutory rights, even those that define privileges and immunities, more meaningful than those guaranteed by our Constitution. There is, too, little difference in the rights sought to be protected. Petitioners in *Monell* were endeavoring to prevent class based discrimination, albeit, they were not within the ambit of protection offered by the Thirteenth Amendment or § 1981.

City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985), spotlighted the logic of *Monell* and reiterated that a municipality

39 During the debates over the legislation which lead to the adoption of the Civil Rights Act of 1871, Senator Sherman introducted an amendment which attempted to allow municipal corporations to be named in actions for damages caused by riot. Cong. Globe, 39th Cong., 1st Sess. 663 (1866). As the amendment came out of committee, it placed the responsibility for damages directly upon the municipality. *Id.* at 749-55. The defeat of the amendment has been a mainstay in the analysis of the meaning of section 1983. *See, e.g., Monroe v. Pape*, 365 U.S. 167, 191 (1961); *Monell*, 436 U.S. at 691n. 57.

could only be liable for its own constitutional torts. *Id.* at 818 (plurality opinion).[40] The Court confirmed the position in *Pembaur* and recently, again, in *Praprotnik*.

In *Pembaur*, the Court expressed the conclusion, based upon the legislative history reviewed in *Monell*, that § 1983 could not be interpreted to incorporate any vicarious liability doctrines. It was the view of the *Pembaur* Court that "while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of *others*." 475 U.S. at 479 (emphasis added). It was the necessity of avoiding the creation of a federal law of *respondeat superior* which inevitably led to the result reached in *Monell*. *Id.*

The Court has tracked the history of section 1981 in numerous opinions, *see General Building Contractors Assn.*, 458 U.S. at 383-84; *see also Georgia v. Rachel*, 384 U.S. 780 (1966), and we do not feel it necessary to attempt to resolve the question of § 1981's ancestry here. *See, e.g., Runyon v. McCrary*, 427 U.S. at 192-205 (White, J., dissenting). Suffice it to say that following the ratification of the Fourteenth Amendment, Congress passed the Civil Rights Act of 1870, Ch. 114, 16 Stat. 140 (also known as the Voting Rights Act or the Enforcement Act), which included, pursuant to the power granted Congress by § 5 of the Amendment, and in order to constitutionally shore up

40 *Amici* NAACP Legal Defense Fund and ACLU have spent a considerable portion of their brief discussing the availability of *respondeat superior* at the time that the Civil Rights Act of 1866 was adopted. We do not feel that the common law doctrine's existence is relevant. If the Court wishes to imply a direct cause of action, it can certainly draft the contours of the right. If it wishes to deny the use of *respondeat superior*, the fact that it existed at common law now, one or two hundred years ago, is equally irrelevant. In any event, as the majority opinion in *City of Oklahoma City*, 471 U.S. at 819n. 5, points out, the cases known to have allowed vicarious liability to be applied to municipalities at the time that the various Reconstruction Civil Rights Acts were enacted, do not support the broad *respondeat superior* liability requested by the plaintiff.

the previous Civil Rights Act,[41] a reenactment of the 1866 Act in its entirety. Section 16 of the 1870 Act seems to be patterned on § 1 of the Civil Rights Act of 1866, but differs in a few respects from that Act. It does contain virtually the identical language to that which is now contained in present § 1981.[42]

General Building Contractors v. Pennsylvania, 458 U.S. 375 (1982), is instructive, although the Court did not use the opportunity of the case to determine the issue now before the Court. The Court was first called upon to see if "discriminatory intent" is a necessary ingredient of a cause brought to enforce the privileges safeguarded by § 1981. In arriving at its conclusion that "intent" to discriminate is a necessary part of the proof in an action to enforce § 1981, the Court tracked the evolution of present day § 1981 and, quoting from *Hurd v. Hodge*, 334 U.S. 24, 32-33 (1948), recognized the common heritage of the Civil Rights Act of 1866 and the Fourteenth Amendment. 458 U.S. at 384-85. In determining whether § 1981 reaches practices that merely result in a disproportionate impact, it was important to keep in mind, the opinion taught us, the history of the times and the events which forged the law. *Id.* at 386; *see also Strauder v. West Virginia*, 100 U.S. 303, 306-07 (1879); *see generally* K. Stampp, *The Era of Reconstruction, 1865-1877* (1965). The Court's study of those events and the legislative debates led it to conclude that "Congress instead acted to protect the freedmen from *intentional* discrimination by those

41 *E.g.*, Cong. Globe, 39th Cong., 1st Sess. 2511 (1866) (Remarks of Rep. Eliot); *see* R. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 Ark. L. Rev. 741, 766n. 112 (1987) ("It is commonly known that the fourteenth amendment was passed in part to insure the constitutionality of the Act of 1866").

42 The legislative history of § 1983 is outlined in *Monell* and need not be summarized here. Section 1981, in its present form, has been law since 1870. It was adopted as § 16 of the Voting Rights Act of May 31, 1870, ch.114, 16 Stat. 140. It was the result of the Congress' view that the States were depriving newly freed persons of the equal protection of the law in violation of the Fourteenth Amendment. *Cf.* Cong. Globe, 41st Cong., 2nd Sess. 3 (1869); Cong. Globe, 41st Cong., 2nd Sess. 3658 (1869) (Statement of Senator Stewart); *see also Runyon*, 427 U.S. at 197-202 (White, J., dissenting).

whose object was . . . [to make them] victims of unjust laws." *Id.* at 388. Emphasis added.

Two things stand out from the Court's explanation of the law's purpose and reach. If the law is meant to reach only "intentional" violations, *respondeat superior* is incompatible with it. The doctrine of *respondeat superior* places liability upon an employer solely because he, she or it is an employer; intent becomes meaningless. Moreover, once intent is removed from the statute, one of the main policy reasons for the law will be lost. The law was meant to reach "constitutional tort-feasors" and to prevent them from denying individuals their rights. If liability is shifted to the state regardless if it is at fault, the deterrent will be moved.

The second aspect of the Court's pronouncement is that § 1981 was aimed at "unjust laws." Clearly, the intention is to punish the state as a creator of those laws and not as an employer. Finally, the Court's concluding remarks about the Fourteenth Amendment and its relationship to the modern day § 1981 are illuminating. The Court wrote:

> [T]he origins of the law can be traced to both the Civil Rights Act of 1866 and the Enforcement Act of 1870. Both of these laws, in turn, were legislative cousins of the Fourteenth Amendment. The 1866 Act represented Congress' first attempt to ensure equal rights for the freedmen following the formal abolition of slavery effected by the Thirteenth Amendment. As such, it constituted an initial blueprint of the Fourteenth Amendment, which Congress proposed in part as a means of "incorporat(ing) the guaranties of the Civil Rights Act of 1866 in the organic law of the land." [Citation omitted] The 1870 Act, which contained the language that now appears in § 1981, was enacted as a means of enforcing the recently ratified Fourteenth Amendment. In light of the close connection between these Acts and the Amendment, it would be incongruous to construe the principal object of their successor, § 1981, in a manner markedly different from that of the [Fourteenth] Amendment itself.

Id. at 389-90. This language answers the challenge that § 1981 does not include the phrase "under color of state law" or the "causes to be subjected" language. Of course, section 2 of the Act did include similar language and it was the means by which section 1 was to be enforced. *The Civil Rights Cases*, 109 U.S. at 16-17. Even with the metamorphosis that the 1866 statute went through, the intention remained that "cause' under "color of state law" be required for enforcement. *See Virginia v. Rives*, 100 U.S. 313, 317-18 (1879) (*dictum*). The drafters' notes accompanying the previously discussed proposed revision makes this explicit.

The above-referenced language leads to the inevitable conclusions that § 1981 should not be construed in a manner markedly different from the Act, section 1983, which implemented the Fourteenth Amendment. Statutory law is not drafted in a closet. Past legislative decisions influence the drafting of bills. New legislation ties to past experience and prior enactment. Uniformity and consistency of regulation is as important in the halls of Congress as it is in the hallowed room of this Court. *See generally* 2A Sutherland, Statutes and Statutory Construction § 45.10 (J. Singer 4th ed. 1984). The Congress that passed the Civil Rights Act of 1866, initiated the Amendment that was implemented by the Congress that adopted the Civil Rights Act of 1871. Unquestionably, it knew of the construction that had been placed upon the 1866 Act by the Congress that adopted it and sought to have § 1983 fit the same mold. *See generally* A. Avins, *The Civil Rights Act of 1866, The Civil Rights Bill of 1966, and the Right to Buy Property*, 40 S. Cal. L. Rev. 274, 304 (1967). Looking backward, the defeat of the Sherman amendment in 1871, just as decidedly, was caused by the same concerns which had to govern the drafters of the 1866 Act. *See Monell*, 436 U.S. at 658 n. 57. If the defeat of the Sherman amendment tells us that § 1983 does not support the use of the doctrine of *respondeat superior*, it equally reveals the same about § 1981.[43] *See* R. Matasar, *Personal Immunities Under*

---

43 "[W]hen Congress' rejection of the only form of vicarious liability presented to it is combined with the absence of any language in

Section 1983: The Limits of the Court's Historical Analysis, 40 Ark. L. Rev. 741, 766-68, 766n. 112 (1987).

In 1866, without the benefit of the Fourteenth Amendment, concerns about federalism almost prevented the 1866 Act from becoming law. *Cf.*, *e.g.*, Globe at 1083 (Remarks of Rep. Davis); *id* at 2446 (Remarks of Senator Grimes). Those who doubted its legitimacy presumed that the law would impinge on the domain of the states by interfering with their internal law-making and judicial affairs. *E.g.*, Cong. Globe, 39th Cong., 1st Sess. 1120-21 (1866) (Remarks of Rep. Rogers); *see generally* J. TenBroek, *Equal Under the Law* 183 (1958). These fears would have prevented the Congress from expanding the reach of the 1866 Act by the use of the doctrine *respondeat superior*.

Monell, as the Fifth Circuit recognized in *Jett*, 837 F.2d at 1247, was in part grounded on the absence of any language in § 1983 which could be construed to create *respondeat superior* liability. 436 U.S. at 2037n. 57. "This is, of course," to quote the appellate court, "likewise true as to section 1981." *Id.* Moreover, as we have tried to emphasize throughout this brief, § 1981 contains no language of liability; it is only the declaration of rights to be protected. The absence of language creating a cause of action is significant for another reason—one should not construe a statute to allow vicarious liability against municipalities in the absence of a clear Congressional mandate. And, we might add, looking for Congressional intent to allow *respondeat superior* in a statute that does not contemplate any type of civil liability is a gesture in futility. Finally, in the same vain, we are not aware of any criminal prosection of a municipality based upon the official criminal conduct of one of its employees. The employee may face criminal charges; the city does not.[44] If a municipality could not be vicariously charged

§ 1983 which can easily be construed to create *respondeat superior* liability, the inference that Congress did not intend to impose such liability is quite strong," according to *Monell*. 436 U.S. at 693 n. 57. The same is true when applied to § 1981.

44 Representative Bingham imparted this very thought to the Congress during the debate over the Ku Klux Klan act: "It is clear that if Congress do so provide by penal laws for the protection of these rights, those violating them must answer for the crime, and *not the States*. The United States punishes men, not States, for a violation of its laws." Cong. Globe, 42d Cong., 1st Sess. app. 85-86 (1871). Emphasis added.

with a crime, then it is logical to assume that the Congress that passed the 1866 Civil Rights Act as a criminal law could not have had any type of *respondeat superior* liability in mind when they voted it into law. Recognizing that the 1866 Act was a criminal law statute, looking at it to determine if the Congress intended to apply the common law doctrine of *respondeat superior* to § 1981 civil actions can, of course, lead to uniquely one result: by definition, the intent to incorporate the doctrine must be absent.[45]

The above cases apply whether the present day § 1981 is derived from the Civil Rights Act of 1866, the Enforcement Act of 1870 or the Ku Klux Klan Act. Starting with the 1866 Act, two points are salient. As passed, section 1 of the Act was intended to be enforced by the provisions of section 2. *See*, *e.g.*, Globe at 1758 (Remarks of Senator Trumbull). Section 2 was, according to Senator Trumbull, the "machinery to carry [section 1] into effect." *Id.* at 475. In interpreting the measure, one cannot look at section 1 in a shadow. Section 2 provides, in almost identical language to the language from § 1983 which was compelling in deciding *Monell*: "*Any person who*, under color of any law . . . *shall subject, or cause to be subjected*, any person . . . to the deprivation of any right . . . shall . . ." *Compare* Civil Rights Act of 1866, § 2, ch. 31, 14 Stat. 27 (1866), *with Monell*, 436 U.S. at 691-92. Emphasis added.

45 Plaintiff argues in his brief that the legislative intent to include *respondeat superior* in the 1866 Civil Rights Act can be drawn from the Congress' silence in the face of settled principles existing at the time the statute was adopted. Brief of Petitioner at 26-27. Whether *respondeat superior* existed at the time the 1866 Act was adopted is irrelevant. A principle must apply to the statute being considered before one can assume that silence meant that Congress intended to include the doctrine. Here, unlike the situation with § 1983, where the Congress was passing a civil statute that specifically allowed damage actions, the argument makes little sense.

Given the relationship of section 1 of the 1866 Act to section 2 of the Act, *Monell*'s interpretation of the meaning of "cause to be subjected" applies here in spite of the phrase's absence in present day § 1981.

The intent of Congress in passing the 1866 Act, if it intented any civil remedy at all, which is, of course, highly improbable, was to impose liability via section 2, not section 1, on a government that, under color of some official policy, "causes" an employee to violate another's section 1 rights. *Cf.* 436 U.S. at 692. At the same time, following *Monell*'s reasoning, the language of section 2 "cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tort-feasor." *Id.*

Furthermore, section 1 of the 1866 Act concluded with the expression "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."[46] This language signifies that it was the intention of the Congress to strike down any of the state laws, etc., that were interfering with the ability of former slaves to obtain all the privileges of citizenship. It was the actions of the states at which section 1 was directed, not at individuals, and the use of the "contrary notwithstanding" phraseology in section 1 only served to reinforce the language of section 2. If a legislature did not pass any offensive laws, the Civil Rights Act would not operate within their state. Of course, the legislative history confirms this. *See* Globe at 476 (Remarks of Senator Trumbull); *id.* at 1758. This Court, too, after reviewing this language, arrived at this identical conclusion, in 1883, over one hundred years ago, albeit in *dictum*. *The Civil Rights Cases*, 109 U.S. at 16.

One of the persuasive statements demonstrating the fallacy of the assertion that the Congress intented *respondeat superior* to

46 The above-quoted language does not appear in § 1981, however, it was removed from the earlier act when the laws were revised in 1874, hence, its omission is of no consequence. The commissioners were specifically instructed to omit "redundant" enactments and to "simplify" the statutes. Act of June 27, 1866 §§ 1, 2, 14 Stat. 74. The language was unnecessary since the vehicle for enforcement was § 1983.

apply to the 1866 Act was made by Senator Trumbull in his defense of section 2 of the act. In its proper construction, he asks rhetorically, "Who is to be punished?" "Is the law to be punished?" "Are the men who make the law to be punished?" And, most importantly to our inquiry, "Does this section propose to punish the community where the custom prevails?" He answers himself, "Not at all" and continues:

> Or is it to punish the person who, under color of the custom, deprives the party of his right? It is a manifest perversion of the meaning of the section to assert anything else.

Id. Application of the doctrine of *respondeat superior* in the circumstances of § 1981 would most certainly "punish the community" and be a flagrant perversion of the meaning of the section.

Justice White's *Runyon* analysis of the legislative history of § 1981 applies with greater force to the facts of this case than to *Runyon* itself, and leads to the inevitable conclusion that, if § 1981 is a Fourteenth Amendment statute, it must be read, like § 1983, to preclude liability based upon the doctrine of *respondeat superior*. As such, it requires state action as defined in *Monell*, and, accordingly the doctrine of *respondeat superior* cannot be applied to § 1981. Therefore, whether § 1981 is derived from the Civil Rights Act of 1866 or from a later enactment, *respondeat superior* is not a part of the statute's enforcement provisions.

CONCLUSION

The Court should affirm the decision of the Fifth Circuit Court of Appeals that the doctrine of *respondeat superior* does not apply to claims brought to protect the rights, privileges, or immunities granted by section 1981 and affirm the application of *Praprotnik* to the free speech claims. However, the Court should order the case against the defendant Dallas Independent School District dismissed, since no actor involved in the alleged deprivations was a policymaker of the district, as a matter of state law, and the alleged wrongdoers were governed by policies which did not create the asserted constitutional torts.

Respectfully submitted,

LEONARD J. SCHWARTZ*
DENNIS J. EICHELBAUM
BEN W. NIEDECKEN
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204
(214) 824-1620 Ext. 468

*Counsel for Respondent***

* Counsel of Record for the Respondent

** Counsel for the Respondent would like to publicly thank the Reference Librarians at the Law Library of the Library of Congress and at the Texas Archives for their assistance in researching the legislative history of the Reconstruction Era Acts. We would also like to thank Eleanor Eastep, Shirley A. Jeffers and Diana Cantu for their administrative support in accumulating the numerous documents involved.

FILED
MAR 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2084
No. 88-214

In The

Supreme Court of the United States

October Term, 1988

NORMAN JETT,

Petitioner,

vs.

DALLAS INDEPENDENT SCHOOL DISTRICT,

Respondent.

DALLAS INDEPENDENT SCHOOL DISTRICT,

Cross-Petitioner,

vs.

NORMAN JETT,

Cross-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

FRANK GILSTRAP *
FRANK HILL
SHANE GOETZ
Hill, Heard, Oneal
Gilstrap & Goetz
1400 West Abram Street
Arlington, Texas 76013
(817) 261-2222
Counsel for Petitioner,
Cross-Respondent
*Counsel of Record

INDEX

INDEX i
TABLE OF AUTHORITIES ii
ARGUMENT 1
I. Petitioner can sue directly under 42 U.S.C. § 1981 1
A. The court should not consider Respondent's new argument 1
B. Respondent's argument is contrary to longstanding precedent 3
1. Nineteenth Century precedent 3
2. Modern precedent 4
C. Civil suits against governmental entities cannot be distinguished 6
1. Respondent's position cannot be squared with existing case law 6
2. The Court has already rejected Respondent's argument 7
3. Congress did not intend for Section 1981 rights to be enforced by Section 1983 suits 8
D. Congress intended that the 1866 Civil Rights Act would be enforced by civil suit 10
1. Statutory language 10
2. Legislative debates 13
E. Subsequent sessions of Congress have approved the Section 1981 civil remedy 17
a. Section 1983 17
b. Refusal to amend Section 1981 18
c. The amendment to Section 1988 18
II. The rejection of the Sherman Amendment in 1871 is inapposite 19
III. The assessment of the *Monell* facts in this case should be dealt with on remand 20
CONCLUSION 20

TABLE OF AUTHORITIES

Cases **Page**

Adickes v. Kress, 398 U.S. 144 (1970) 3

Allen v. State Board of Elections,
393 U.S. 544 (1969) 12

Bell v. City of Milwaukee,
746 F.2d 1205 (7th Cir. 1984) 5

Bell v. Hood, 327 U.S. 678 (1946) 13

Bhandari v. First Nat'l Bank of Commerce,
829 F.2d 1343 (5th Cir.) (en banc) 6

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 18

Burnett v. Grattan, 468 U.S. 42 (1984) 9

Butner v. United States, 440 U.S. 48 (1979) 20

Bylew v. United States, 80 U.S. 638 (1872) 12

Cannon v. University of Chicago,
441 U.S. 677 (1979) 11, 12, 18

Chapman v. Houston Welfare Rights Org.,
441 U.S. 600 (1979) 8, 12

City of Canton v. Harris,
No. 86-1088, (February 28, 1989) 3

City of Memphis v. Green, 451 U.S. 100 (1981) 5

City of Oklahoma City v. Tuttle,
471 U.S. 808 (1985) 3, 19

City of St. Louis v. Praprotnik,
485 U.S. ____, 108 S.Ct. 915 (1988) 3, 10, 19

Communications Workers of America v. Beck,
108 S.Ct. 2641, 101 L.Ed.2d 634 (1988) 19

Deckert v. Independence Shares Corp.,
311 U.S. 282 (1940) 12

EEOC v. Gaddis, 733 F.2d 1373 (10th Cir. 1984) 5, 6

General Bldg. Contractors v. Pennsylvania,
458 U.S. 375 (1982) 5

Greenwood v. Ross, 778 F.2d 448 (8th Cir. 1985) 5

Hague v. C.I.O., 307 U.S. 496 (1939) 1

Herman & MacLean v. Huddleston,
459 U.S. 375 (1983) 18

Hurd v. Hodge, 334 U.S. 24 (1948) 4

In re Hobbs, 12 Fed. Cas. 262 (C.C.D. Ga. 1971) 4

In re Turner, 24 Fed. Cas. 337
(C.C.D.Md. 1867) 3, 4

J.I.Case Co. v. Borak, 377 U.S. 426 (1964) 12

Jett v. Dallas I.S.D., 798 F.2d 748 (5th Cir. 1986),
on motion for rehearing, 837 F.2d 1244
(5th Cir. 1988) 5, 9

Johnson v. Railway Express Agency,
421 U.S. 454 (1976) 5, 8, 9, 18

Jones v. Alfred H. Mayer Co.,
392 U.S. 409 (1968) 4, 7, 8

Leonard v. City of Frankfort Electric & Water Plant Board, 752 F.2d 189 (6th Cir. 1985) 5

Live Stock-Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Land & Slaughter-House Co., 15 Fed. Cas. 649 (C.C.D. La. 1870) 4

Mackey v. Lanier Collections Agency & Service, Inc., 108 S.Ct. 2182, 101 L.Ed. 634 (1988) 19

Mahone v. Waddle, 564 F.2d 1018 (3rd Cir. 1977) .. 5, 6, 11

Marbury v. Madison, 5 U.S. 137 (1803) 13

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) 13, 14, 18

Metrocare v. Washington Metropolitan Area Transit Autho., 679 F.2d 922 (D.C. Cir. 1982) 5

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) 5

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) 19

Miree v. DeKalb County, 433 U.S. 25 (1977) 3

Monell v. Dept. of Social Services, 436 U.S. 658 (1977) 2, 17, 19, 20

Monessen Southwestern Ry. Co. v. Morgan, 108 S.Ct. 1837 (1988) 18

Moor v. County of Alameda, 412 U.S. 693 (1983) 11, 18

Runyon v. McCrary, 427 U.S. 160 (1976) 5, 18

Middlesex County Sewerage Authorities v. Sea Clammers, 453 U.S. 1 (1981) 13

Sethy v. Alameda County Water Dist., 545 F.2d 1157 (9th Cir. 1976) 5, 6

Shaare Tefila Congregation v. Cobb, 95 L.Ed.2d 594 (1987) 5

Springer v. Seaman, 821 F.2d 871 (1st Cir. 1987) 5

St. Francis College v. Al-Khazraji, 107 S.Ct. 2022 (1987) 5

Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) 4, 5, 12

Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) 4, 6

Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981) 5

Texas v. Gaines, 23 Fed.Cas. 869, (C.C.W.D.Tex. 1874) 12

Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33, (1916) 13

Thompson v. Thompson, 108 S.Ct. 513 (1988) 10

Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973) 4

Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. 11 (1979) 13

Union Iron Co. v. Pierce, 24 Fed.Cas. 583 (C.C.D.Ind. 1969) 13

United States v. Rhodes, 27 Fed.Cas. 785, (C.C.D.Ky. 1866) 4, 12

Statutes

United States Code

42 U.S.C.

§ 1981 ..... *passim*

§ 1982 ..... 3-8, 18

§ 1983 ..... 1-10, 18-20

§ 1985 18

§ 1986 18

§ 1988 18

Statutes at Large

Civil Rights Act of 1866 ..... *passim*

§ 1 ..... 11, 12

§ 2 5

§ 3 ..... 4, 10, 11, 14, 18

Civil Rights Act of 1871 ..... 8, 9, 10, 17

§ 7 9

Civil Rights Act of 1964, Title VII 9, 18

Miscellaneous

Cong. Globe, 39th Cong., 1st Sess. (1866) 13-16

Cong. Globe, 41st Cong., 2d Sess. (1870) 17

Cong. Globe, 42nd Cong., 1st Sess. (1871) 17

ARGUMENT

I. Petitioner can sue directly under 42 U.S.C. § 1981.

The Fifth Circuit construed Section 1981 to include a "policy or custom" requirement.[1] We sought certiorari on that point,[2] and most of our brief addressed that issue.[3] After we had briefed, Respondent chose to raise what it calls "another — and more serious — issue".[4] Respondent now says that local governments are simply not subject to civil suit under Section 1981. According to Respondent, a claim against a local government for deprivation of rights secured by Section 1981 can only be brought under Section 1983. And, of course, Section 1983 contains a "policy or custom" requirement.

There are three problems with this argument. First, it comes too late (Part A below). Second, this Court has previously rejected it (Parts B and C). Third, it fails on its merits (Parts C and D).

A. The court should not consider Respondent's new argument.

Respondent's claim that there is no civil cause of action under Section 1981 is an afterthought, "and like most afterthoughts in litigated matters it is without adequate support in the record."[5] The record contains no hint that Respondent has ever challenged our right to sue directly under Section 1981. Indeed, Respondent has conceded our right to sue under Section 1981 at all times.

In the District Court, The Respondent failed to contest our right to sue in its Rule 12(b)6 motion to dismiss, its motion for

---

1 Pet. App. pp. 27A-30A.

2 Pet. pp. 9-29

3 Pet.Br. pp. 11-31.

4 Resp.Br. p. 14.

5 *Hague v. C.I.O.*, 307 U.S. 496, 522 (1939) (Stone, J., concurring).

summary judgment, its portion of the proposed pretrial order, its requested jury issues and instructions, its objections to the jurycharge, Tr. 649-683, its motions for directed verdict, Tr. 597-612, 643-644, its motion for judgment n.o.v., and its motion for new trial.

To the contrary, in its motion for directed verdict, Respondent spoke of racial discrimination "for which Section 1981 was adopted primarily and intended to redress." Tr. 599. In its Rule 12(b)(6) motion, pp. 3-5, Respondent discussed the plaintiff's burden of proof under Section 1981 and concluded by suggesting that Petitioner be required to replead "his 42 U.S.C.A. § 1981 claim."

Before the Fifth Circuit, where Respondent was Appellant, Respondent only argued that the rule of *respondeat superior* should not apply to Section 1981.[6] There is no suggestion that we could not sue under Section 1981, and Respondent's brief expressly referred to "Section 1981 actions" on no less than eight occasions.[7]

The Fifth Circuit accepted Respondent's argument. It rejected the application of *respondeat superior* and held that Section 1981 suits must meet a "policy or custom" standard. At the same time, it accepted our right to bring suit directly under Section 1981.

The Respondent did not seek review of the Fifth Circuit's decision that we could sue directly under Section 1981. Nor did it suggest, either in its Response to our Petition or in its Cross-Petition, that it had doubts as to whether such a suit could be brought. Instead, it "acknowledg[ed] the need for further definition of the 'contours' of municipal liability under 42 U.S.C. § 1981." Reply to Pet., p.7, and said that the "Fifth Circuit correctly held that the requirements of *Monell*...would be extended to claims for damages against municipalities based upon employment decisions alleged to be in violation of 42 U.S.C.A. §1981."

6 No. 85-1015, Brief of Appellants, pp. 2-3, 37-41, 60-68, and Brief of Appellants in Response to Apellee's Brief, pp. 6-7.

7 No. 85-1015, Brief of Appellants, pp. ii, 60, 61, 63, 64, 65, 66.

Cross Pet. p. 6. It was only after this Court granted certiorari — and after we briefed — that Respondent first questioned the longstanding precedent allowing civil suits directly under Section 1981.

The Court should decline to consider Respondent's argument. Instead it should decide the issue "squarely presented to and decided by the Court of Appeals"[8] and upon which this Court granted certiorari.[9] "It is most unfair to permit a defeated litigant in a civil case tried to a verdict before a jury to advance legal arguments that were not made in the district Court, especially when that litigant *agrees*, both in its motions and its proposed instructions, with its opponent's view of the law."[10]

B. Respondent's argument is contrary to longstanding precedent.

Respondent says Congress viewed the Civil Rights Act of 1866 "as limited to a criminal remedy." Resp. Br., p. 26. For 120 years, however, federal courts have allowed civil suits to enforce that statute and its modern descendents, Section 1981 and 1982.

1. Nineteenth Century precedent.

Immediately after enactment of the 1866 Civil Rights Act, three members of this Court, sitting as Circuit Justices, wrote that the statute could be enforced by way of civil action in the federal courts.

In *In re Turner*, 24 Fed. Cas. 337 (C.C.D.Md. 1867), a black apprentice sought release from her indenture because its terms did not provide for the education which Maryland law guaranteed to white apprentices. Chief Justice Chase granted her petition for

8 *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).

9 *See City of Canton v. Harris*, No. 86-1088, (February 28, 1989), at n. 5; *Miree v. DeKalb County*, 433 U.S. 25 (1977); and *Adickes v. Kress*, 398 U.S. 144, 147 n. 2 (1970).

10 *City of St. Louis v. Prapotnik*, 485 U.S. ____, 108 S.Ct. 915, 945-6 (1988) (Stevens, J., dissenting) (emphasis in opinion).

habeas corpus, holding that the indenture was "in contravention of that clause of the first section of the civil rights law...which assures to all citizens without regard to race or color, 'full and equal benefit of all laws and proceedings for the security of persons as is enjoyed by white citizens...' " 24 Fed. Cas., at 339.[11] Three years later Justice Bradley permitted private parties to obtain injunctive and declaratory relief directly under the 1866 Act. *See Live Stock-Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Land & Slaughter-House Co.*, 15 Fed. Cas. 649, 655 (C.C.D. La. 1870). Finally, in *United States v. Rhodes*, 27 Fed. Cas. 785, 786 (C.C.D.Ky. 1866), Justice Swayne construed the grant of jurisdiction in Section 3 of the 1866 Act to include "causes of civil action."[12]

2. Modern precedent.

In *Hurd v. Hodge*, 334 U.S. 24 (1948), the Court used Section 1982 to strike down racially restrictive covenants in the District of Columbia. While Section 1982 was raised as a defense in *Hurd*, that was not the case less than a month later in *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948). There the court invalidated a California law denying fishing licenses to certain aliens and allowed the plaintiff to obtain mandamus in state court to enforce rights guaranteed by Section 1981. 334 U.S., at 419-420.

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court held that Section 1982 reaches acts of private racial discrimination in housing, and it allowed plaintiffs to obtain an injunction. 392 U.S., at 414 n. 14. Although *Jones* left open the issue of damages, *Id.*, that question was soon resolved. In *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), the court expressly allowed a plaintiff to recover damages under Section 1982, and in *Tillman v. Wheaton-Haven Recreation Ass'n* 410 U.S. 431 (1973), the Court allowed damages under both Sections 1982 and 1981.

---

11 *See also, In re Hobbs*, 12 Fed. Cas. 262 (C.C.D. Ga. 1971), denying habeas corpus because the state statute involved did not "conflict with the civil rights bill."

12 In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 457 n. 3, Justice Harlan read Section 3 to give federal courts concurrent jurisdiction over "all cases in which the specified rights were denied."

Finally, in 1976 the Court wrote that "[a]n individual who establishes a cause of action under Section 1981 is entitled to both equitable and legal relief, including [damages and backpay]." *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-460 (1976).

Since *Johnson* the Court has considered claims under Sections 1981 and 1982 on six occasions. In four of these cases it upheld rights of individual plaintiffs to recover.[13] In the other two cases the Court denied recovery while recognizing that civil suits can be brought directly under Section 1981 and Section 1982.[14] Finally, the right of individuals to bring suit suit and recover damages under Section 1981 has been affirmed by all of the circuits.[15]

Against this weight of authority the Respondent can cite not a single case. Obviously, the enforcement of Section 1981 is not limited to the criminal penalties originally found in section 2 of the 1866 Act. Private individuals *do* have a right to sue directly under Sections 1981 and 1982.

---

13 *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285 (1976); *Runyon v. McCrary*, 427 U.S. 160, 168 (1976); *Shaare Tefila Congregation v. Cobb*, ___ U.S. ___, 107 S.Ct. 2019, 95 L.Ed.2d 594, 598 (1987); and *St. Francis College v. Al-Khazraji*, ___ U.S. ___, 107 S.Ct. 2022, 2026 (1987).

14 In *General Bldg. Contractors v. Pennsylvania*, 458 U.S. 375, (1982), Justice O'Connor summarized the majority opinion as holding that "a *cause of action* based on 42 U.S.C. § 1981 requires proof of intent to discriminate." 458 U.S., at 403 (emphasis added). In *City of Memphis v. Green*, 451 U.S. 100 (1981), the Court characterized *Sullivan* as holding that a plaintiff "had a *cause of action* under *§ 1982*" *(emphasis added)*. *451 U.S., at 121 n. 33. (emphasis added)*

15 *See, e.g., Metrocare v. Washington Metropolitan Area Transit Auth.*, 679 F.2d 922, 927 (D.C. Cir. 1982); *Springer v. Seaman*, 821 F.2d 871 (1st Cir. 1987); *Mahone v. Waddle*, 564 F.2d 1018 (3rd Cir. 1977), *cert. den.*, 483 U.S. 904 (1978); *Jett v. Dallas I.S.D.*, 798 F.2d 748 (5th Cir. 1986), *on motion for rehearing*, 837 F.2d 1244 (5th Cir. 1988); *Leonard v. City of Frankfort*, 752 F.2d 189 (6th Cir. 1985); *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984); Taylor v. Jones, 653 F.2d 1193, 1200 (8th Cir. 1981); *Greenwood v. Ross*, 778 F.2d 448, 456 (8th Cir. 1985); *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157 (9th Cir. 1976) (en banc); *EEOC v. Gaddis*, 733 F.2d 1373, 1380 (10th Cir. 1984).

C. Civil suits against governmental entities cannot be distinguished.

1. Respondent's position cannot be squared with existing case law.

Respondent attempts to distinguish our case because the defendant is a local government. Respondent implies that this court has limited its Section 1981 holdings to private parties. Resp. Br. p. 17. Yet Section 1981 plaintiffs were allowed to recover against the State of California in *Takahashi, supra*, 334 U.S. 410.[16]

Respondent also concedes that certain kinds of civil suits *can* be brought against local governments under Section 1981. It agrees that Congress intended to allow civil suits under the 1866 Act to obtain habeas corpus relief, Resp. Br. p. 29, and to enforce the rights "to sue, be parties, and give evidence...and to the full and equal benefit of all laws." Resp.Br. pp. 26-27 n. 31. Additionally, Respondent conceded before the Fifth Circuit that federal courts "have equitable power to order remedial relief, where the discrimination occurs by employees, such as back pay, reinstatement, and injunctive relief."[17] These concessions render the Respondent's position untenable.

First, our claims are not limited to damages. Petitioner also sought backpay and attorney's fees. Jt.App. p. 7.[18]

Second, it's difficult to extract a coherent rule of law from Respondent's position. Respondent would allow a private party to be sued for damages, but a local government could only be sued for equitable and declaratory relief — plus habeas corpus — plus claims arising from a deprivation of the right "to sue, be parties and give evidence" -- plus claims arising under the "full and equal benefit" clause.

Third, Respondent's position will subject private defendants to a *more* rigorous liability standard than governments. A local government whose agent racially discriminates in leasing public housing will be insulated by the "policy or custom" standard. A private landlord whose leasing agent practices racial discrimination will be liable under a less demanding standard. Surely the 1866 Congress could not have intended such an anomaly.

2. The Court has already rejected Respondent's argument.

Respondent says that "§ 1983 is the means by which one obtains a cause of action against a municipality to protect the rights and privileges protected in § 1981. Likewise § 1981 does not, by its own language, grant any cause of action; it only details substantive rights." Resp. Br. p. 15. The argument is not new. In *Jones v. Alfred H. Mayer*, the Respondent argued as follows:

> ...nowhere in this entire first section of the original [1866 Civil rights Act] is there any mention of any *remedy* or *right to sue* for any kind of relief . . . .[I]t does no more than make a general statement of constitutional policy . . . The only

---

16 All of the Circuit Court cases in the preceding footnote involved suits against local governmental entities, except for *Gaddis*. Respondent dismisses these as the result of "offhanded *sub silentio* assumptions". Resp. Br. p. 18. Yet, that is hardly a fair description of *Sethy*, where the en banc Ninth Circuit allowed Section 1981 recovery against a municipal water district, or *Bhandari v. First Nat'l Bank of Commerce*, 829 F.2d 1343 (5th Cir.) (en banc, where the Fifth Circuit decided that a Section 1981 claim for alienage discrimination can be brought *only* against the state. Nor does this do justice to the Third Circuit's monumental effort in *Mahone*, whose dissent provides most of Respondent's arguments.

17 Brief of Appellants, No. 85-1015, p. 7.

18 Petitioner was paid through the date he "resigned" rather than report to his new assisgnment as ninth grade coach. Pet.Br. p. 6. The jury found that Petitioner was constructively terminated, but this finding was set aside by the Fifth Circuit which concluded "as a matter of law" that Petitioner's ordeal was simply "not so difficult or unpleasant." Pet. App. p. 7. Respondent contends that this finding has not been challenged, but this is incorrect. Although we did not seek certiorari on that question, we did preserve it. Pet. App. p. i, Question 4.

purpose now served by [it] is an incomplete compendium of rights the violation of which may give rise to civil suit under . . . Section 1983 of 42 U.S.C. . . .

[T]he section of the Act out of which present Section 1982 was carved was simply a "general statement of constitutional policy" and by itself afforded no civil . . . remedy. . . . [A]t the time of its enactment the Act contained no civil remedy at all . . . . [A] civil remedy was added in 1871.[19]

The Court rejected this argument in *Jones*, 392 U.S., at 414 nn. 13-14 (citing cases). It is now settled that the 1871 Act "created a new civil remedy, neither repetitive of nor entirely analogous to any of the provisions of the earlier Civil Right s Acts." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 651 (1979) (White, J. concurring).

3. Congress did not intend for Section 1981 rights to be enforced by Section 1983 suits.

a. Congress intended to provide for different civil remedies under Sections 1981 and 1983.

Respondent argues that the civil cause of action under Sections 1981 and 1982 is purely judge-made: it was necessary for the *Johnson* Court to "create" such a remedy, since there was no existing remedy for racial discrimination by private employers. Therefore, we are told, there is no need for the Court also to "create" a civil cause of action against government employers under Section 1981, since Section 1983 is already available to remedy employment discrimination by those defendants. Resp.Br. pp. 16-17.

Respondent's argument is premised on the notion that, when *Johnson* was decided in 1976, there was no statute to remedy racial discrimination by private employers. But this is simply

19 No. 645, Oct. term, 1967, Brief for Respondents, pp. 40-41 (emphasis omitted).

wrong. Twelve years earlier, Congress enacted Title VII to the Civil Rights Act of 1964. Title VII provides a comprehensive set of remedies against both public and private employers. In fact, in *Johnson* the plaintiff brought suit under Section 1981 *and* Title VII. The *Johnson* Court rejected the argument that since the employee could sue under Title VII, he could not sue under Section 1981. Congress intended for an employee to have both remedies. 421 U.S., at 457. Similarly, Congress intended for the remedies under Sections 1981 and 1983 to be independent of one another. *Cf., Burnett v. Grattan*, 468 U.S. 42 (1984) ("...the independence of the remedial scheme established by the reconstruction Era Acts.")

b. Congress preserved the civil cause of action under the 1866 Act by including a saving clause in the 1871 Act.

Respondent says that, even if Congress intended to allow civil actions under Section 1981, it somehow changed all this by enacting Section 1983. The argument is familiar. The Fifth Circuit reasoned that, by enacting the 1871 statute, Congress somehow engrafted a "policy or custom" requirement onto the existing Section 1981 cause of action. In our opening brief, we showed that this argument ran afoul of the knotty problems of "repeal by implication." Pet. Br. pp. 15-18. *See also*, Comment: *Jett v. Dallas Independent School District:* The Applicability of Municipal Vicarious Liability Under 42 U.S.C. Section 1981. Notre Dame Law Rev. Vol. 63, No. 2, pp. 240-242 (1988).

Now the Respondent argues that when Congress enacted the 1871 Act, it repealed the existing civil remedy under the 1866 Act. This left the 1871 statute, the modern Section 1983, as the exclusive civil remedy for Section 1981 violations, according to Respondent. Of course, this also would be a repeal by implication. and the arguments which we made in our opening brief apply here with equal force.

Yet, there is no need to trudge through those arguments again. The saving clause in Section 7 of the 1871 Act reads as follows:

> That nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto.

Jt.App. p. 106. Thus, Congress intended that the 1871 Act (Section 1983) would have *no effect* on the 1866 Act (Section 1981).

D. Congress intended that the 1866 Civil Rights Act would be enforced by civil suit.

Although the 1866 Act contained no provision expressly granting a right to sue, there is ample evidence that Congress "actually had in mind the creation of a private cause of action." *Thompson v. Thompson*, 108 S.Ct. 513, 516 (1988). We examine, as always, the "language and history"[20] of the statute.

1. Statutory language.

Section 3 of the 1866 Civil Rights Act is set forth below. The various clauses are numbered for reference.

[FIRST CLAUSE]

> The district court...shall have, exclusively of the courts of the several states, cognizance of all crimes and offenses committed against the provisions of this act, and also, concurrently with the circuit courts..., of all *causes, civil* and criminal, *affecting persons* who are denied or cannot *enforce* in [state courts] any of *the rights secured to them by the first section of this act;*

[SECOND CLAUSE]

> and if any suit or prosecution, civil or criminal [is] commenced in any State court against any officer, civil or military, or other person [for certain specified acts], such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the [1863 Habeas Corpus Act].

20 *City of St. Louis v. Praprotnik*, 108 S.Ct. 915, at 923 (plurality).

[THIRD CLAUSE]

> The jurisdiction in *civil* and criminal *matters* hereby conferred on the district and circuit courts ...shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry same into effect;

[FOURTH CLAUSE]

> but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable *remedies* and punish offences against the law, *the common law shall be extended and govern* said courts in the trial and disposition of *such cause* and, if of a criminal nature, in the infliction of punishment on the party found guilty.

Jt. App. p. 85 (emphasis added).

In *Moor v. County of Alameda*, 411 U.S. 693 (1973), the court reviewed the history of this statute and concluded that "[t]he initial portion of § 3 of the Act established federal jurisdiciton to hear, among other things, *civil actions brought to enforce § 1*". 411 U.S. at 705 (emphasis added). The italicized language in the First Clause is consistent with this view. Individual "persons" could bring suits ("civil causes") to enforce "any of the rights secured by" section 1 of the Act.[21] There is no other way to explain this language.

It has been argued, for example, that Section 3 merely "permitted defendants who could not enforce their rights in state court to remove the proceedings against them to federal court."[22] But, only a defendant can remove a case. The First Clause, however, does not speak of defendants. It uses a broader term, i.e., "persons". Removal is dealt within the Second Clause, which does say "defendants". Clearly the "persons" referred to in the First Clause included plaintiffs.

21 *See also, Cannon v. University of Chicago*, 441 U.S. 677, 736 n. 7 (1979) (Powell, J., dissenting).

22 *Mahone v. Waddle*, 564 F.2d 1018, 1045 (3rd Cir. 1977), (Garth, J., dissenting).

Respondent argues for another interpretation: this language merely "was meant to allow a person to bring a state law claim into the federal courts when some state law requirement precluded it from being litigated in the local system." Resp.Br. p. 26 n. 31. Specifically, we are told, Congress had in mind state statutes which prohibited blacks from testifying against whites. *Id.* While this view was advanced at one time[23], it was ultimately rejected by the Court.[24]

Additionally, such an approach would involve only part of the rights secured by Section 1, i.e., the right "to sue, be parties, and give evidence." Congress, however, again spoke in broader terms. The First Clause allows "civil causes" to "enforce" "*any of the rights*" secured by Section 1.

This Court has consistently construed this kind of broad, jurisdictional language as evidencing Congressional intent to permit civil suits. Thus in *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940), the Court construed a grant of jurisdiction "over all suits in equity and actions at law brought to enforce any liability or duty created" by a particular statute. The Court held that this conferred a right to sue. 311 U.S., at 288.[25]

Similarly, the Court has also found evidence of Congressional intent to create a civil cause of action in broad declarations of rights, such as found in Section 1 itself.[26]

Moreover, in evaluating Congressional intent, the Court "must take into account [the] contemporary legal context."[27] The 1866 Congress had every reason to expect

23 *Cf., United States v. Rhodes*, 27 Fed.Cas. 785, 787-788 (C.C.D.Ky. 1866), *with Texas v. Gaines*, 23 Fed.Cas. 869, 870-871 (C.C.W.D.Tex. 1874).

24 *See Bylew v. United States*, 80 U.S. 638, 641 (1872). *See also, Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 631 n. 11 (1979).

25 *See also, J.I.Case Co. v. Borak*, 377 U.S. 426, 428 n.2 (1964); *Allen v. State Board of Elections*, 393 U.S. 544, 561 (1969); *Sullivan*, 396 U.S., at 238.

26 In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Court noted that "this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case." 441 U.S., at 690 n. 13. The *Cannon* Court cited the language of Sections 1981 and 1982 as its primary example.

27 *Cannon*, 441 U.S., at 698-699.

that the courts would permit suits under the Civil Rights Act, even absent specific language creating a civil remedy. The 39th Congress was concerned with civil rights, and in *Marbury v. Madison*, Chief Justice Marshall had written that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury".[28] The practice of allowing civil suits in the absence of specific statutory authorization was well established by the Civil War[29] and can be traced to English common law authorities.[30] During this period "federal courts, following a common law tradition regarded the denial of a remedy as an exception rather than the rule."[33] Thus it is hardly surprising that Congress omitted statutory language expressly creating a right to sue under the Civil Rights Act.

? gislative Debates

The 1866 Debates

On the v he introduced the Civil Rights bill, Senator Trumbull dec

> Th[e thirteenth] amendment declared that all person in the United States should be free...There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons are to be affected by them have some *means of availing themselves of their benefits.*[34]

28 5 U.S., at 163.

29 *See Union Iron Co. v. Pierce*, 24 Fed.Cas. 583 (C.C.D.Ind. 1969), and cases cited at Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33, 36 (1916), and *Bell v. Hood*, 327 U.S. 678, 684 nn. 6 & 7 (1946); *see also, National Sea Clammers*, 453 U.S. at 23 n. 2 (Stevens, J., concurring); *Curran*, 46 U.S., at 374-375 & nn. 53 & 54.

30 *See Rigsby*, 241 U.S., at 36, *Cannon*, 141 U.S., at 689 n. 10; *Transamerica v. Lewis*, 444 U.S., at 26 n. 2 (White, J., dissenting); *Curran*, 102 S.Ct. at 374 n. 52.

31 & 32. Footnotes 31 & 32 deleted.

33 *Curran*, 456 U.S. at 375-376.

34 Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (emphasis added).

Trumbull described Section 3 as creating federal jurisdiction "over the cases of persons who are discriminated against by State laws or customs".[35] In the subsequent debate, before the Senate voted to override President Johnson's veto, Trumbull defended the provision of Section 3 in which "jurisdiction is given to the Federal courts of a case affecting the person that is discriminated against."[36]

Where, for example, a discriminatory state law or custom was being enforced against an individual:

> then he could go into the Federal court. . . .If it be necessary in order to protect the freedmen in his rights that he should have the authority to go into the Federal courts in all cases where a custom prevails in state, or where there is a statute-law of the state discriminating against him, I think we have the authority to confer that jurisdiction under the second clause of the [Thirteenth] amendment. . . . That clause authorizes us to do whatever is necessary to protect the freedman in his liberty. The faith of the nation is bound to do that; and if it cannot be done without, [we] would have authority to allow him *to come to the federal courts* in all cases.[37]

Opponents of the bill understood that it authorized a civil cause of action.

> [T]his bill sends the people with their causes *into the courts* of the United States. . . . I am not so much afraid of any law that sends the people *to the courts* as I am of a law which places them under the control and power of irresponsible officials. . . . Sir, what is this bill? It provides, in the first place, that the civil rights of all men, without regard to color shall be equal; and, in the second place, that if any man shall violate that principle by this conduct, he shall be responsible to the court; that he may be prosecuted criminally and punished for the crime, *in a civil action and damages recovered by the party wrongful.* Is that not broad

35 *Id.* at 475.

36 *Id.* at 1759.

37 *Id.* at 1759 (emphasis added).

enough?[38]

Senator Cowan criticized the provision for a civil remedy "as a delusion and a snare"[39] because the federal courts were located so far from most claimants, and the cost of litigation there was so high.

Respondent argues that Congress "rejected the right to a damage action" when it disapproved a motion by Representative Bingham to recommit the bill. Resp. Br. p. 25. Respondent describes Bingham as "one of the foremost supporters of civil rights", Resp. Br. p. 24, but Bingham was in fact one of the leading *opponents* of the 1866 Civil Rights Bill, and he ultimately voted against it.

It's inaccurate to describe Bingham's proposal as providing for a civil action. Bingham moved to recommit the bill with two instructions. First, he advocated deleting the general language prohibiting *all* forms of racial discrimination. See Resp. Br. p. 24; Cong. Globe, 39th Cong., 1st Sess. 1271-72, 1291. Second, Bingham proposed

> *to strike out all parts of said bill which are penal,* and which authorized criminal proceedings, and *in lieu thereof* to give to all citizens injured by denial or violation of any of the other rights secured or protected by said act an action in the United States courts with double costs in all cases of recovery, without regard to the amount of damages.

Id. (emphasis added). Respondent suggests that this was a proposal to *add* to the remedies in the 1866 Act, and that in considering the Bingham motion Congress "grappled with the availability of a right of action to enforce section 1 and explicitly rejected it." Resp. Br. p. 25 (emphasis added).

But neither Bingham, nor any member of the House who addressed his motion, regarded it as a proposal to *add* anything to the enforcement of the Act. It was regarded as a proposal to *remove* the criminal remedy. Bingham's speech in support of his

38 *Id.* at 601 (emphasis added).

39 *Id.* at 1782-1783.

40 Footnote 40 deleted.

motion was a lengthy diatribe against the 1866 Act, particularly the anti-discrimination provision.[41] With regard to the second part of his motion, quoted above, Bingham's only explanation was as follows:

> You propose to make it a penal offense for the judges of the States to obey the constitution and laws of their states, and for their obedience thereto to punish them by fine and imprisonment as felons. You cannot make an official act, done under color of law, and without criminal intent and from a sense of public duty, a crime.[42]

Bingham insisted that the effect of his proposal was "to take from the bill what seems to me its oppressive and I might say its unjust provisions."[43]

Although the supports of the 1866 Act generally opposed Bingham's proposal, none of them expressed any opposition to the existence of civil remedy or suggested that such a remedy was any less appropriate than the disputed penal provision. On the contrary, Representative Shellabarger argued:

> What difference in principle is there between saying that the citizen shall be protected by the legislatie power of the United States in his rights by civil remedy and declaring that he shall be protected by penal enactments against those who interfere with is rights? There is no difference in the principle involved.[44]

Nothing in the debates on Bingham's motion suggests that Congress thought it was 'grappl[ing] with the availability of a right of action to enforce section 1". What Bingham intended to bring about, and all that Congress "grappled with", was the *deletion* of the criminal sanctions for the enforcement of Section 1. No representative who spoke in favor of or against Bingham's motion treated it as *adding* anything to the civil rights bill.

---

41 *Id.* at 1291-93.

42 *Id.* at 1293; see also *id.* at App. 157 (Rep. Delano).

43 *Id.* at 1291.

44 *Id.* at 1295.

b. Subsequent Debates

Respondent also relies on statements made during the debates of subsequent sessions of Congress, but its summaries are inaccurate. Respondent asserts that in 1870 "[t]he remarks of Senator Pool, . . . present the view that the Civil Rights Act was *solely* to be enforced as a criminal statute." Resp. Br. p. 27 (emphasis added). The word "solely" does not appear in Senator Pool's remarks. Cong. Globe, 41st Cong., 2d Sess. 3611 (1870). Respondent characterizes Representative Shellabarger as saying that "whereas *the 1866 Act* was *only* criminal". Resp.Br. p. 28 (emphasis added). Shellabarger did not say that the 1866 Act was "only" criminal. Cong. Globe, 42nd Cong., 1st Sess. App. 68 (1871). It is true that Representative Blair criticized the Sherman Amendment for imposing a novel "obligation" on cities, but the obligation to which he objected was the affirmative duty to stop all riots within the city's jurisdiction. *Id.* at 795, quoted in *Monell*, 436 U.S. at 673. Blair could not have meant, as Respondent suggests, that municipal liability based on *respondent superior* was "without a precedent in this County", because by 1866 the application of *respondent superior* to claims against muncipalities had been accepted by courts in virtually every state.[45]

E. Subsequent sessions of Congress have approved the Section 1981 civil remedy

a. Section 1983

Section 1 of the Ku Klux Klan Act of 1871 provided that defendants would be "liable" in an "action at law... to be prosecuted in the [federal courts], with and subject to the same rights of appeal, review upon error, and other remedies provided in *like cases* in such courts *under the provisions of the [Civil Rights Act of 1866].*" Jt.App. p. 101-102 (emphasis added). If a right to sue under the 1866 statute did not exist, then why the reference to "like cases"?

---

45 Brief Amicus Curiae of the NAACP Legal Defense and Educational Fund, Inc., *et al.*, at pp. 22-47.

b. Refusal to amend Section 1981

As shown, the courts have upheld the right to enforce Section 1981 by civil suit almost from the beginning. This fact, coupled with Congress' refusal to amend the statute, is itself evidence that Congress approved the availability of a civil action under Section 1981.[46] Thus, when Congress enacted Title VII, it noted "that the remedies available to an individual under Title VII are co-extensive with the ind[i]vidual's right to sue under... § 1981." *Johnson*, 421 U.S., at 459. "Later in considering the Equal Employment Opportunity Act of 1972, the Senate rejected an amendment that would have deprived a claimant of any right to sue under § 1981." *Id.*

c. The amendment to Section 1988

In *Moor v. County of Alameda*, 411 U.S. 693 (1973), the Court traced 42 U.S.C. § 1988 to the Fourth Clause of Section 3 of the 1866 Act. 411 U.S. *Id.*, at 705. It was "plain on the face of the statute" that section 1988 was "intended to complement the various acts which do create federal causes of action for the violation of federal civil rights," 411 U.S., at 702, including "42 U.S.C. §§ 1981, 1982, 1983, 1985," 411 U.S., at 702, n. 13, and that "Congress...directed that § 1988 would guide the courts in the enforcement of a particular cause of action, namely that created in § 1981." *Id.*, at 705 n. 19.

In 1976, however, the Court refused to construe Section 1988 to allow the award of attorneys fees in an action brought directly under Section 1981.[47] Four months later Congress passed the Civil Rights Attorneys' Fees Awards Act, which amended Section 1988 to allow recovery of attorneys fees "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986..." 42 U.S.C. § 1988.

---

46 *Cannon*, 441 U.S., at 703 & nn. 7 & 40; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 732-733 (1975); *Merrill Lynch, Pierce Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, at 381-382 (1982); *Herman & MacLean v. Huddleston, 459 U.S. 375 (1983)*, *Monessen Southwestern Ry. Co. v. Morgan*, 108 S.Ct. 1837, 1844 (1988).

47 *Runyon*, 427 U.S., at 184-185.

II. The rejection of the Sherman Amendment in 1871 is inapposite.

In Part II of its argument, Resp.Br. pp. 37-47, Respondent finally speaks to the Question Presented: does the cause of action arising directly under Section 1981 contain a "policy or custom" requirement?

We argued that the "policy or custom" requirement arises from certain "crucial terms" which are found in Section 1983. Since those crucial terms are missing from Section 1981, it cannot contain a "policy or custom" requirement. Pet.Br. pp. 21-26.

Respondent replies that the "policy or custom" requirement does not depend entirely on the language of the statute. He says that while *Monell*, *Tuttle*, *Pembaur*, and *Praprotnik*, were "braced...on the specific wording of Section 1983, the language of the act was not the only foundation upon which the Court built." Resp.Br. p. 38. Respondent contends there is another basis for the "policy or custom" requirement, namely Congress' rejection of the Sherman Amendment in 1871. *Id.*, at 38-39. Of course we are concerned with the intent of Congress in 1866, and this Court has often noted that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."[48]

Respondent then compounds the error by glossing over a vital distinction. In footnote 57 of *Monell*, the Court taught that the 1871 Congress intended -- by rejecting the Sherman Amendment -- to reject *respondeat superior* liability for municipalities. However, it does not follow that by rejecting the Sherman Amendment, Congress also intended to adopt a "policy or custom" standard. A rejection of *respondeat superior* simply does not equate to an acceptance of a "policy or custom." The two concepts are not mutually exclusive. There are, in fact, several approaches to the problem of vicarious liability. *Cf., e.g., Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 2410 (1986). *Respondeat superior* and "policy or custom" merely represent the two extremes.

Thus, while the rejection of the Sherman Amendment is evidence that the 1871 Congress did not want municipalities to

---

48 See cases collected at *Mackey v. Lanier Collections Agency & Service, Inc.*, 108 S.Ct. 2182, 101 L.Ed. 634 (1988); and *Communications Workers of America v. Beck*, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988) (Blackmun, J., concurring).

be held liable on a *respondeat superior* basis, it is not evidence that that Congress also believed that the proper standard was "policy or custom." The "policy or custom" requirement can only come from the "crucial terms" of Section 1983.

We have demonstrated that these crucial terms cannot apply to Section 1981, and Respondent has not challenged this. Thus, the "policy or custom" requirement cannot apply to Section 1981.

III. The assessment of the Monell Facts in this case should be dealt with on remand

Respondent's only discussion of the *Monell* issue is found in a series of scattered footnotes,[49] which raise a fact-bound issue: whether the General Superintendent of the Dallas Independent School District is a policymaking official within the meaning of *Monell*. The Superintendent is the chief executive officer of a large metropolitan school district. He directs 15,000 employees and oversees the education of more than 100,000 students. In the face of this Respondent insists, apparently seriously, that the Superintendent "is not a policymaker". Resp.Br. p. 7.

The fact specific issue of whether the Superintendent has authority to make policy is not — particularly at this juncture — an appropriate issue for resolution by this Court. First this simply is not the issue which Respondent originally asked this Court to review. Second, the Fifth Circuit expressly did not decide whether the Superintendent had policymaking authority. That issue should be resolved in the first instance by the lower courts "who deal regularly with questions of state law in their respective [courts] and [who] are in a better position than [this Court] to determine how local courts would dispose of comparable issues." *Butner v. United States*, 440 U.S. 48, 58 (1979).

CONCLUSION

The Court should affirm Petitioner's Section 1981 recovery against Respondent. The Section 1983 portion of the case should be remanded to the District Court.

Respectfully submitted,

FRANK GILSTRAP*
1400 West Abram Street
Arlington, Texas 76013
(817) 261-2222
*Counsel of Record for Petitioner

---

49 Brief for Respondent, p. 7 nn. 9-11, p. 8, nn. 12, 14, p. 36, n. 36.

(3) (3)

Nos. 87-2084, 88-214

Supreme Court, U.S.
FILED
JAN 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NORMAN JETT,

Petitioner,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT,

Respondent.

DALLAS INDEPENDENT SCHOOL DISTRICT,

Cross-Petitioner,

v.

NORMAN JETT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AND THE AMERICAN CIVIL LIBERTIES UNION

JULIUS LEVONNE CHAMBERS
ERIC SCHNAPPER*
NAACP Legal Defense & Educational Fund, Inc.
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Amici Curiae

* Counsel of Record

QUESTIONS PRESENTED

1. Must a public employee who alleges job discrimination on the basis of race show that the discriminaton resulted from an official "policy or custom" in order to recover under 42 U.S.C. §1981?

2. Did the Fifth Circuit's decision correctly apply Monell v. Department of Social Services, 436 U.S. 658 (1978), and it progeny?

Page

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities iii

Interest of Amici 1

Summary of Argument 2

Argument 5

I. The 1866 Civil Rights Act, As Originally Enacted, Did Not Require Proof of Official Policy 10

A. No Proof of Official Policy Is Required in Section 1981 Actions Against Private Defendants 15

B. No Proof of Official Policy Is Required in Section 1981 Actions Against Governmental Defendants 22

II. The Rights and Remedies Created by the 1866 Civil Rights Act Were Not Altered by the Adoption of the 1871 Civil Rights Act 47

Conclusion 57

Page

TABLE OF AUTHORITIES

Allegheny County v. Rowley, 4 Clark (Pa.) 307 (1849) 39

Amell v. United States, 384 U.S. 158 (1966) 48

Anthony v. Adams, 42 Mass. 284 (1840) 38,40

Barry v. City of St. Louis, 17 Mo. 121 (1852) 41

Batchelder v. City of Salem, 58 Mass. 599 (1849) 45

Botkin v. Osborne, 39 Ill. 71 (1864) 45

Browning v. City of Springfield, 17 Ill. 43 (1855) 31,41

Casey v. Baldridge, 15 Ill. 43 (1853) 45

Chicago v. Robbins, 67 U.S. (2 Black) 418 (1863) 42

Cincinatti v. Stone, 5 Ohio St. 38 (1855) 41

City of Baltimore v. Marriott, 9 Md. 160 (1856) 42

City of Dayton v. Pease, 4 Ohio St. 80 (1854) 19,31,33

	Page
City of Detroit v. Corey, 9 Mich. 165 (1861)	36
City of Logansport v. Wright, 25 Ind. 512 (1865)	31,35
City of Milwaukee v. Davis, 6 Wisc. 377 (1858)	39
City of Providence v. Clapp, 58 U.S. (17 How.) 161 (1854)	28
City of Richmond v. Long's Administrators, 17 Gratt. (Va.) 375 (1867)	31,32
City of St. Louis v. Gurno, 12 Mo. 414 (1849)	36-37,42
Clague v. City of New Orleans, 13 La. Ann. 275 (1858)	43
Conrad v. Trustees of Ithaca, 16 N.Y. 158 (1857)	39
Cotes & Patchin v. City of Davenport, 9 Iowa 227 (1859)	35
County Commissioners of Anne Arundel County v. Duckett, 20 Md. 468 (1863)	38
Creal v. City of Keokuk, 4 G. Greene (Iowa) 47 (1853)	41

	Page
Cross v. District Township of Dayton, 14 Iowa 28 (1862)	45
Croy v. Skinner, 410 F. Supp. 117 (N.D. Ga. 1976)	16
Dargan v. Mayor of Mobile, 31 Ala. 469 (1858)	35
Dean v. New Milford Township, 5 Watts & Serg. (Pa.) 545 (1843)	31
Delmonico v. Mayor, etc. of New York, 1 N.Y. Super. Ct. 222 (1848)	37
Dickerson v. City Bank & Trust Co., 590 F. Supp. 714 (D. Kan. 1984)	16
District of Columbia v. Carter, 409 U.S. 418 (1973)	7
Doyan v. School District, 35 Vt. 520 (1863)	45
E.E.O.C. v. Gaddis, 733 F.2d 1373 (10th Cir. 1984)	16
Flowers v. Crouch Walker Corp., 552 F.2d 1277 (7th Cir. 1977)	16
Fowle v. Common Council of Alexandria, 28 U.S. (3 Pet.) 398 (1830)	39

	Page
Freeland v. City of Muscatine, 9 Iowa 461 (1859)	41
General Building Contractors v. Pennsylvania, 458 U.S. 375 (1982)	16,17,18
George v. School District No. 8, 20 Vt. 493 (1848)	45
Gilman v. Bassett, 33 Conn. 298 (1866)	45
Harrison Township v. Conrad, 26 Ind. 337 (1866)	45
Hickok v. Trustees of Platts-burgh, 16 N.Y. 158 (1854)	28-29
Hickok v. Trustees of Platts-burgh, 15 Barbour (N.Y.) 427 (Sup. Ct. 1853)	37
Hilsdorf v. City of St. Louis, 45 Mo. 94 (1869)	39
Holden v. Shrewsbury School District No. 10, 38 Vt. 529 (1866)	45
Hooe v. Alexandria, 12 Fed. Cas. 462 (C.C.D.C. 1802)	40
Imbler v. Pachtman, 424 U.S. 409 (1976)	12
Inhabitants of Searsmont v. Farwell, 3 Me. 450 (1825)	45

	Page
Izard v. Arndt, 483 F. Supp. 261 (E.D. Wisc. 1980)	16
Jett v. Dallas Independent School District, 837 F.2d 1244 (5th Cir. 1988)	5,11
Jett v. Dallas Independent School District, 798 F.2d 762 (5th Cir. 1986)	4,5,15
Johnson v. Municipality No. One, 5 La. Ann. 100 (1850)	5,30,42
Jones v. Local 520, International Union of Operating Engineers, 524 F. Supp. 487 (S.D. Ill. 1981)	16
Kavanagh v. City of Brooklyn, 38 Barb. (N.Y.) 232 (Sup. Ct. 1862)	29
Kelley v. Mayor, etc. of New York, 4 E.D. Smith (N.Y.) 291 (Ct. Com. Pleas 1855)	41
Kelly v. City Council of Charles-ton, 4 Rich. Law. (S.C.) 462 (1854)	43
Kelly v. Mayor, etc. of New York, 11 N.Y. 432 (1854)	41
Lloyd v. Mayor, etc. of New York, 5 N.Y. 369 (1851)	29,31

	Page
Lucero v. Beth Israel Hospital Center, 479 F. Supp. 452 (D. Colo. 1979)	16
Lytle v. Household Manufacturing, Inc., No. 88-334	1
Malone v. Schenk, 638 F. Supp. 423 (C. D. Ill. 1985)	16
Mason v. School District No. 14, 20 Vt. 487 (1848)	45
Mayor, etc. of Baltimore v. Kelly, 9 Md. 160 (1856)	31
Mayor, etc. of Memphis v. Lasser, 28 Tenn. 757 (1849)	34
Mayor, etc. of New York v. Bailey, 2 Denio (N.Y.) 433 (Ct. of Errors 1845)	37
Mayor, etc. of New York v. Furze, 3 Hill (N.Y.) 612, 618-19 (Sup. Ct. 1842)	29,32
Meares v. Commissioners of Wilmington, 31 N.C. 73 (1848)	32
Mercantile Nat. Bank v. Langdeau, 371 U.S. 555 (1963)	48

	Page
Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979)	10
Monell v. Department of Social Services, 436 U.S. 658 (1978)	i,8,9,10, 24,44,49-52
Morey v. Town of Newfane, 8 Barbour (N.Y.) 645 (Sup. Ct. 1850)	37
Morton v. Mancari, 417 U.S. 535 (1974)	48
Nebraska City v. Campbell, 67 U.S. (2 Black) 590 (1863)	28
Neville v. School Directors of District No. 1, 36 Ill. 71 (1864)	45
Nevins v. City of Peioria, 41 Ill. 502 (1866)	35,41
Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981)	3,12,13
Offut v. Bougeois, 16 La. Ann. 163 (1861)	45
Oklahoma City v. Tuttle, 471 U.S. 808 (1985)	17
Owen v. City of Independence, 445 U.S. 622 (1980)	4,12,13,22, 24-25, 41,45

	Page
Pack v. Mayor, etc. of New York, 11 N.Y. 432 (1854)	41
Painter v. Pittsburgh, 46 Penn. St. 213 (1863)	41
Patterson v. McLean Credit Union, No. 87-107	1,23
Paul v. School District No. 2, 28 Vt. 575 (1856)	45
Pembaur v. Cincinnati, 475 U.S. 469 (1988)	17
Pierson v. Ray, 386 U.S. 547 (1967)	12
Prather v. Lexington, 13 Ben. Monroe's Ky. Rep. 559 (1852)	36
Pritchard v. Georgetown, 19 Fed. Cas. 1348 (C.C.D.C. 1819)	38
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974)	48
Richardson v. School District No. 10, 38 Vt. 602 (1866)	45
Roberts v. City of Chicago, 26 Ill. 249 (1861)	39
Rochester White Lead Co. v. City of Rochester, 3 N.Y. 463 (1850)	42

	Page
Rolfe v. Cooper, 20 Me. 154 (1841)	45
Ross v. City of Madison, 1 Ind. 281 (1848)	34
Ruckleshaus v. Monsanto Co., 467 U.S. 986 (1984)	5,48
St. Louis v. Praprotnik, 99 L. Ed.2d 107 (1988)	46
St. Paul v. Seitz, 3 Minn. 297 (1859)	41
Shaw v. Mayor of Macon, 19 Ga. 468 (1856)	45
Small v. Inhabitants of Danville, 51 Me. 359 (1864)	36
Smith v. Milwaukee, 18 Wisc. 63 (1864)	41
Smoot v. City of Wetumpka, 24 Ala. 112 (1854)	41
Stewart v. City of New Orleans, 9 La. Ann. 461 (1854)	38
Templin v. Iowa City, 14 Iowa 59 (1862)	35
Treadwell v. Mayor, etc. of New York, 1 Daly (N.Y.) 123 (Ct. Com. Pleas 1861)	41

	Page
Trustees of Town of Milford v. Simpson, 11 Ind. 520 (1858)	45
Wallace v. City of Muscatine, 4 G. Greene (Iowa) 373 (1854)	41
Weightman v. Washington, 66 U.S. (1 Black) 39 (1861)	4,26-28,32
Wilde v. City of New Orleans, 12 La Ann. 15 (1857)	40
Wood v. Strickland, 420 U.S. 308 (1975)	12
Other Authorities	
Civil Rights Act of 1866, 42 U.S.C. §1981	passim.
Civil Rights Act of 1871, 42 U.S.C. §1983	passim.
42 U.S. C. 1986	53
Blackstone's Commentaries	19
F. Hillard, The Law of Torts (1859)	20
W. Paley, A Treatise on the Law of Principal and Agent (1840)	20
Prosser and Keeton on Torts (5th ed. 1984)	13

C. Smith, A Treatise on the Law of Master and Servant (1852)	20
J. Story, Commentaries on the Law of Agency (1857)	14,19,20
W. Theobald, The Law of Principal and Surety and Principla and Agent (1836)	20
Cong. Globe, 39th Cong., 1st sess.	8
Cong. Globe, 42nd Cong., 1st sess.	8,54-56

BRIEF AMICI CURIAE
OF THE NAACP LEGAL DEFENSE AND
EDUATIONAL FUND, INC.
AND THE AMERICAN CIVIL
LIBERTIES UNION

INTEREST OF AMICI CURIAE[1]

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist Blacks to secure their constitutional and civil rights by means of litigation. Over the course of the last two decades, the Fund's attorneys have represented plaintiffs in a substantial number of section 1981 cases, both in the lower courts and in this Court. See, e.g., Patterson v. McLean Credit Union, No. 87-107; Lytle v. Household Manufacturing, Inc., No. 88-334.

[1] Letters from the parties consenting to the filing of this brief have been filed with the Court.

We currently represent in pending section 1981 actions a number of plaintiffs whose rights will necessarily be significantly affected by this Court's decision in the instant case.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan, membership organization dedicated to defending civil liberties and civil rights. In pursuit of that goal, the ACLU has participated in numerous cases before this Court involving the interpretation of federal civil rights statutes. This case raises again the question of whether those laws will remain an effective tool for combatting discrimination. The resolution of that question is a matter of vital concern to the ACLU.

SUMMARY OF THE ARGUMENT

The interpretation of the 1866 Civil Rights Act must be based on the terms and

legislative history of that statute, not on the meaning and history of the 1871 Civil Rights Act. The membership of the House of Representatives in the thirty-ninth and forth-second Congresses, which adopted the 1866 and 1871 acts respectively, was almost entirely different. Of the 122 Representatives who voted in 1866 for the first Civil Rights Act, only 15 were still in the House in 1871, and only 4 of these voted against the Sherman amendment.

Whether respondeat superior, or comparable contract doctrines, should be applied to a section 1981 claim turns on the principles of common law which would have governed similar claims in 1866. Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). The Fifth Circuit in the instant case correctly acknowledged that respondeat superior would apply to a

section 1981 claim against a private defendant. Jett v. Dallas Independent School District, 798 F.2d 748, 763 (5th Cir. 1986). It would be incongruous if a lesser standard of liability were applied to claims against government defendants.

In 1866 the doctrine of respondeat superior was widely utilized to determine the degree of municipal liability for a violation of a legal duty by a city employee. Weightman v. Washington, 66 U.S. (1 Black) 39 (1861). In this era municipal corporations were generally subject to "the same standards of liability as any private corporation." Owen v. City of Independence, 445 U.S. 622, 644 (1980). The principles of respondeat superior were applied by state courts prior to 1866 to determine whether a slaveowner could recover damages from a city for injuries inflicted on a slave by

city employees. Johnson v. Municipality No. One, 5 La. Ann. 100 (1850).

The 1866 Civil Rights Act, in the period prior to the enactment of the 1871 Act, clearly did not require proof of official policy or custom. The adoption of the 1871 statute did not alter the meaning of the 1866 law. Repeals by implication are disfavored. Ruckleshaus v. Monsanto Co., 467 U.S. 986 (1984).

ARGUMENT

The decisions of the Fifth Circuit in this case proceed from one essential but critically flawed premise -- that the meaning of the 1866 Civil Rights Act can and should be divired by reference to the meaning and now reigning construction of the 1871 Civil Rights Act. In its initial opinion the panel below asserted that the doctrine of respondeat superior could not be applied in section 1981 actions against

governmental bodies because, on its view, "[t]o impose such vicarious liability for... certain wrongs based on section 1981 apparently would contravene the congressional intent behind section 1983." Jett v. Dallas Independent School District, 798 F.2d 748, 762 (5th Cir. 1986). The panel in its second opinion relied on what it believed to be "the appropriateness of parallel treatment in this respect of these two post-Civil War statutes." Jett v. Dallas Independent School District, 837 F.2d 1244, 1248 (5th Cir. 1988).

Under most circumstances, however, the interpretation of one statute must be based on its own terms and legislative history, not on the history and meaning of a distinct and subsequent law. An exception might be appropriate for two related and similarly worded statutes adopted

simultaneously by the same Congress to solve the same problem. But such a relationship does not exist between the 1866 Civil Rights Act and the 1871 Civil Rights Act. The 1866 Act was enacted by the thirty-ninth Congress pursuant to the Thirteenth Amendment, and covers both private and governmental acts of discrimination; the 1871 Act was adopted by the forty-second Congress pursuant to the Fourteenth Amendment, covers a wide variety of constitutional and statutory claims, and extends only to conduct under color of state of law. In District of Columbia v. Carter, 409 U.S. 418 (1973), this Court unanimously rejected a similar claim that the 1866 and 1871 acts should be accorded "parallel treatment"; Carter held that, although the words "state and territory" in the 1866 Act encompass the

District of Columbia, those same words in the 1871 Act do not refer to the District.

The legislation enacted by the forty-second congress is a particularly unreliable guide to the intent of the thirty-ninth congress because of the almost total change in the membership of the House of Representatives between 1866 and 1871. Of the 122 members of the thirty-ninth congress who voted for the 1866 Civil Rights Act, only 15 were still members of the House when the 1871 Act was adopted.[2] The interpretation of section 1983 in Monell v. Dept. of Social Services, 438 U.S. 658, 664-701 (1978), turned largely

---

[2] Compare Cong. Globe, 39th Cong., 1st sess. 3, 1861 (1866) with Cong. Globe, 42nd Cong., 1st sess. 5, 801 (1871). The representatives who voted for the 1866 act and were still in the House in 1871 were Nathaniel Banks, Burton Cook, Henry Dawes, John Farnsworth, James Garfield, Samuel Hooper, William Kelley, John Ketcham, John Lynch, Ulysses Mercur, Leonard Myers, Philetus Sawyer, Glenni Scofield, Samuel Shellabarger and William Washburn.

on the vote of the House of Representatives in 1871 rejecting the Sherman amendment. But the rejection of the Sherman amendment by the congressmen in the House in 1871 tells us absolutely nothing about the views of the wholly different group of congressmen who served in 1866. Indeed, among the 15 former members of the thirty-ninth congress who were elected to the forty-second congress, only 4 voted against the Sherman amendment.[3] Representative Shellabarger, the House sponsor of and chief spokesman for the bill containing the Sherman amendment, 436 U.S. at 669-73, was one of the few supporters of the 1866 Act still in Congress in 1871; of the five congressmen whose remarks in opposition to the Sherman amendment were referred to in Monell, only

---

[3] Banks, Cook, Farnsworth and Garfield.

one had even been a member of the earlier thirty-ninth congress.[4]

For these reasons, the 1866 and 1871 acts should be separately evaluated. The first issue is whether the 1866 Civil Rights Act, as originally enacted, required proof of official policy or custom; if, as we urge, the Court holds that the 1866 Act contained no such requirement, it should then consider whether, by adopting the 1871 Act, Congress intended by implication to amend that earlier law and impose such a requirement.

I. THE 1866 CIVIL RIGHTS ACT, AS ORIGINALLY ENACTED, DID NOT REQUIRE PROOF OF OFFICIAL POLICY

The question raised by this case is not whether a city or private corporation can be held liable because of discrimina-

---

[4] 436 U.S. at 673-82 (Reps. Blair, Burchard, Farnsworth, Poland and Willard).

tion by one of its employees, but only when the imposition of such liability is appropriate. Corporations, be they private or municipal, can only act through natural persons; if, as respondent does not deny, cities are subject to suit under section 1981, it will necessarily be as a consequence of discrimination by one or more municipal employees or agents.

The terms of the 1866 Civil Rights Act do not themselves expressly establish any rule regarding when an employer may and may not be held liable for discriminatory acts by its employees. But that silence does not, as the Fifth Circuit believed, authorize the courts to create whatever liability rules they may think supported by their own views of social policy or current "judge-made law." 837 F.2d at 1248. Rather, here, as in ordinary cases of statutory construction,

Congress is presumed to have intended that such liability issues would be controlled by the common law rules applicable to similar claims at the point in time when the statute in question was adopted:

> One important assumption underlying the Court's decisions in this area is that members of the ... Congress were familiar with common-law principles ... and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.

Newport v. Facts Concerts, Inc., 453 U.S. 247, 258 (1981).[5] Such common law principles are assumed to control litigation under section 1981 except in those cases where they would "defeat the promise

---

[5] E.g., Owen v. City of Independence, 445 U.S. 662, 637 (1980) (principles "firmly rooted in the common law"); Imbler v. Pachtman, 424 U.S. 409, 418 (1970) (statute "read in harmony with general principles of tort immunity and defenses rather than in derogation of them"); Wood v. Strickland, 420 U.S. 308, 318 (1975) ("common law tradition"); Pierson v. Ray, 386 U.S. 547, 553-54 (1967) ("doctrines ... solidly established at common law").

of the statute." Newport v. Fact Concerts, Inc., 453 U.S. at 259.[6]

The court below assumed that, in evaluating the potential liability of an employer, all section 1981 claims should be regarded as torts, and that the issue presented by this case is thus simply whether the doctrine of respondeat superior should be applied in these cases. The common law, however, encompassed two

---

[6] Respondent suggested below that the imposition of liability on the city in this case would be inappropriate because intentional racial discrimination is analogous to an intentional tort for which an employer, even under common law principles, could not be held liable. The actual common law rule, however, exonerates an employer only for intentional torts unrelated to the employer's business. Prosser and Keeton on Torts, 505 (5th ed. 1984). This argument, moreover, proves too much, for if racial discrimination were regarded as an intentional tort for which an employer could not be held liable, that doctrine would "insulate[] the municipality from unconsented suits altogether," Owen v. City of Independence, 445 U.S. 622, 647 (1980), even if the tort were committed jointly by a mayor and a city council.

distinct types of rules regarding when an employer was to be held liable for actions of an employee, one set, under the rubric respondeat superior, for torts, and a second set for claims arising in a contract. J. Story, Commentaries on the Law of Agency 521-36 (contract), 536-600 (tort) (1857). Under some circumstances, which we do not here undertake to consider, the differences in those rules might be of significance. The claim in the instant case of constructive discharge is probably more analogous to a contract claim for the wrongful dismissal of an employee than to a tort claim arising, for example, from the injury caused by a negligently maintained street. As we suggest below, however, the disposition of petitioner's claim is the same regardless of whether it is regarded as sounding in contract or in tort.

A. No Proof of Official Policy Is Required In Section 1981 Actions Against Private Defendants

The Fifth Circuit in the instant case expressly held that the doctrine of respondeat superior is applicable to section 1981 claims against a private defendant:

> Plaintiff relies on several cases applying respondeat superior theory under section 1981 in the context of private employment.... Our reasoning, of course, does not prevent the imposition of vicarious liability on a private employer under section 1981.... We believe that the Supreme Court's interpretation in Monell of Congress' intent in enacting section 1983 provides compelling reasons for distinguishing between private and municipal liability under section 1981.

798 F.2d at 763. The lower courts are in virtually unanimous agreement that the principles of respondeat superior are

controlling in section 1981 claims against private employers.[7]

A majority of this Court is already committed to the view that the liability of an employer, at least of a private employer, can be based on the principles of respondeat superior. In General Building Contractors v. Pennsylvania, 458 U.S. 375 (1982), the Court considered a variety of assertions that the employer association in that section 1981 case should be held liable for discrimination

---

[7] E.E.O.C. v. Gaddis, 733 F.2d 1373, 1380 (10th Cir. 1984); Miller v. Bank of America, 600 F.2d 211, 212-13 (9th Cir. 1979); Flowers v. Crouch Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977); Malone v. Schenk, 638 F. Supp. 423, 424-25 (C.D. Ill. 1985); Dickerson v. City Bank and Trust Co., 590 F. Supp. 714, 717 C.D. Kan. 1984); Jones v. Local 520, International Union of Operating Engineers 524 F. Supp. 487, 492 (S.D. Ill. 1931); Lucero v. Beth Israel Hospital Center, 479 F. Supp. 452, 455 (D. Colo. 1979); Croy v. Skinner, 410 F. Supp 117, 123 (N.D. Ga. 1976); Cf. Isard v. Arndt, 483 F. Supp. 261, 263 (E. D. Wisc. 1980) (section 1982).

by a union hiring hall. Justices O'Connor and Blackmun insisted, in a concurring opinion, that the plaintiffs would be entitled on remand to redress against the employers if they could demonstrate that a principal-agent relationship in a fact existed between the employers and the union, thus establishing "the traditional element[] of respondeat superior." 458 U.S. at 404. Justices Marshall and Brennan expressly endorsed this aspect of Justice O'Connor's opinion. 458 U.S. at 417 n. 5 (dissenting opinion). Although Justice Stevens did not address that issue, he has repeatedly insisted that respondeat superior should be applied even in a section 1983 case. Pembauer v. Cincinnati, 475 U.S. 469, 489 (1866) (concurring opinion); Oklahoma City v. Tuttle, 471 U.S. 808,834-44 (1985) (dissenting opinion). Despite the fact

that the defendant employers in General Building Contractors expressly urged this Court to apply to section 1981 the "policy or custom" requirement of Monell,[8] the remaining members of the Court in General Building Contractors premised their opinion on "the assumption that respondeat superior applies to suits based on 1981", 458 U.S. at 395, and held, because of the apparent absence of a master-servant relationship, that the imposition of liability in that case would have required an unwarranted "extended application of respondeat superior." 458 U.S. at 392 n. 18; see also id. at 394 n. 19 (Supreme Court itself to decide whether the facts of the case were "sufficient to invoke the doctrine of respondeat superior").

---

[8] Brief for Petitioners, No. 81-280, pp. 10, 22-24.

Certainly with regard to a private employer there can be no doubt that the extent of an employer's liability for violations of section 1981 by its employees would, where the violation sounded in tort, be controlled by the principles of respondeat superior. In the nineteenth century the doctrine of respondeat superior was recognized as "one of the oldest and best settled doctrines of the common law." City of Dayton v. Pease, 4 Ohio St. 80, 95 (1854). The principle of respondeat superior had its roots in Roman law, J. Story, Commentaries on the Law of Agency, 594 (1857), and was familiar to Blackstone. 1 Blackstone's Commentaries 431-32. By the middle of the nineteenth century both the doctrine of respondeat superior, and various applications and ramifications of the rule, were well settled. See J. Story, Commentaries

on the Law of Agency, 536-600 (Boston, 1857); F. Hilliard, The Law of Torts, v. 2, pp. 524-29 (Boston, 1859); C. Smith, A Treatise on the Law of Master and Servant, pp. 151-93 (Philadelphia, 1852); W. Paley, A Treatise on the Law of Principal and Agent, pp. 294-98 (Philadelphia, 1840); W. Theobald, The Law of Principal and Surety and Principal and Agent, pp. 296-300 (New York, 1836). Similarly, under contract law, although there were complex rules regarding when an agent could make a contract binding his or her principal, once such a contract was made the principal was clearly liable if the agent breached the agreement. Story, supra, pp. 521-36; Smith, supra, pp. 122-43. In 1866, if the employee of a private concern were wrongfully dismissed, or if a third party were injured by the tortious conduct of a servant acting within the course of

his employment, the employer or master would have been liable under state law for the ensuing damages. There is no indication that Congress intended to depart from those established principles and to impose for a violation of section 1981 any lesser degree of responsibility or liability.

Indeed, such a departure from common law principles would fairly fly in the face of the 1866 Civil Rights Act itself. Section 1981 requires in part that blacks be accorded "the same ... full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." If in 1866 a white worker had been wrongfully discharged, he could have obtained an award of lost wages in state court without proof that his employer had a "policy or custom" of wrongfully dismissing employees. The contract clause of the 1866 Civil Rights

Act made it wrongful to discharge an employee on account of his race; it is inconceivable that Congress intended to give to a black employee wrongfully discharged in violation of federal law a remedy in any way less efficacious than the remedy available to a white employee wrongfully discharged in contravention of state law.

B. No Proof of Official Policy Is Required in Section 1983 Actions Against Governmental Defendants

If respondeat superior, and comparable contract principles, apply to a section 1981 action against a private employer or other entity, it would be strange indeed if a lesser standard of liability, and responsibility, applied to governmental defendants. This Court observed in Owen v. City of Independence that it would be

> "uniquely amiss" ... if the government itself -- "the social organ to

> which all in our society look for the promotion of liberty, justice, fair and equal treatment ..." -- were permitted to disavow liability for the injury it has begotten.

445 U.S. at 651. Surely it would be even more amiss if a city or school board could under federal law assert immunity from a claim for which a private defendant would be financially liable. The fifth circuit evidently reached this peculiar result because, although acknowledging that section 1981 covered private conduct, it harbored doubts as to whether the 1866 Act applied to cities at all. 837 F.2d at 247-48. While we adhere to the view which we expressed in Patterson v. McLean Credit Union, No. 87-107, that the 1866 Act applies to private as well as governmental discrimination, nothing in that history suggests any intent on the part of Congress to prohibit only private discrimination, or to apply to private

institutions principles of liability more stringent than were applicable to governmental defendants.

The common law principles which would have been familiar to the thirty-ninth congress encompassed no rule comparable to the "policy or custom" doctrine in Monell. That doctrine was virtually unknown to Anglo-American jurisprudence prior to the 1978 decision in Monell itself. In the mid-nineteenth century, as this Court explained in Owen v. City of Independence, there were two somewhat ill-defined circumstances in which a municipality could be sued in tort in state or federal court. First, cities could be held liable for injuries caused by tortious actions of a "proprietary" rather than "governmental" nature. The building and maintenance of city bridges and streets were the most widely recognized type of proprietary

functions, while the adoption of ordinances was ordinarily deemed a governmental act. Second, cities were subject to suit if they violated a duty imposed by state law or by their own charters, but not for "discretionary", "legislative" or "judicial" activities. 445 U.S. at 644-49. The instant case does not require this Court to resurrect and apply these elusive distinctions, because it is clear that Congress did intend to allow suits against municipalities under section 1981, and thus that it would have rejected the absolute immunity accorded to "discretionary" "governmental" acts. Rather, the historical issue of importance is to ascertain what principles of liability would in 1866 have been applied to municipalities in those instances -- be they for "proprietary" or "ministerial"

actions -- when cities were subject to suit.

It is quite clear that in 1866, when a city was subject to suit in tort, both federal and state courts consistently applied the doctrine of respondeat superior. Tort actions based on a violation of a statutory or ministerial duty are of particular importance, since they are most closely analogous to a violation of section 1981. In Weightman v. Washington, 66 U.S. (1 Black) 39 (1861), the plaintiff sued the District of Columbia for injuries sustained as a result of the collapse of a bridge then spanning Rock Creek at K Street. 66 U.S. at 45-46. The city argued that it was "not responsible for the nonfeasances or misfeasances of the persons necessarily employed" by the city to build and maintain the bridge. This Court unani-

mously rejected that argument, holding that the city was subject to suit because the case involved a violation of a ministerial rather than a discretionary duty, and that liability could be based on negligence by city employees:

> Municipal corporations undoubtedly are invested with certain powers which, from their nature, are discretionary, such as the power to adopt regulations or by-laws ... [I]t has never been held that an action ... would lie against the corporation ... for the failure ... to perform such a duty. But duties arising under such grants ... must not be confounded with the burdens imposed, and the consequent responsibilities arising under another class of powers usually to be found in [municipal] charters, where a specific and clearly defined duty is enjoined.... Where such a duty ... is enjoined, and ... the means to perform the duty are placed at the disposal of the corporation ... they are clearly liable to the public if they unreasonably neglect to comply with the requirement of the charter.... [T]hey are liable for the negligent and unskillful acts of their servants and agents, whenever those acts occasion special injury to the person or property of another.

66 U.S. at 50-51 (emphasis added). On two other occasions prior to 1866 this Court sustained claims against municipalities based on similar claims of negligence by city employees. Nebraska City v. Campbell, 67 U.S. (2 Black) 590 (1863) (neglect to repair bridge, in violation of city charter); City of Providence v. Clapp, 58 U.S. (17 How.) 161 (1854) (negligent failure to remove snow from sidewalk, in violation of state statute).

The applicability of respondeat superior in such cases was indeed "well settled." Nebraska City v. Campbell, 67 U.S. at 592. In Hickock v. Trustees of Village of Plattsburgh the New York Court of Appeals observed, with regard to "the liability of municipal corporations for damages arising from the negligence of malfeasance of their officers," that it

was already "established" that when a municipal corporation

> has become bound ... to do certain things, such corporation ... is liable, in case of neglect to perform ... to a private action at the suit of any person injured by such neglect ... [W]henever it exercises its corporate powers, it is bound to see that due care and caution are used to avoid injury to individuals. It can, of course, be no excuse for the corporation, any more than it would be for an individual, that the work was done and the want of care shown by an employee or servant whom [it] had set to work.

16 N.Y. 158, 162-72 n..[9] The Louisiana Supreme Court agreed in 1850 that "The

---

[9] Several other New York cases also so held. Kavanagh v. City of Brooklyn, 38 Barb. 232, 237 (Sup. Ct. 1862) (city liable where a "duty, purely ministerial, is violated or negligently performed by a public body or officer"); Lloyd v. Mayor, etc. of New York, 5 N.Y. 369, 374 (1851) (where a city's "duty to perform ... is clearly ministerial ... [t]he principle of respondeat superior consequently applies"); Mayor, etc. of City of New York v. Furze, 3 Hill (N.Y.), 618-619 (Sup. Ct. 1842) ("a municipal corporation is ... liable ... where a duty, specifically enjoined upon the corporation as such, has been wholly neglected by its agents").

liability of municipal corporations for the acts of their agents, as a general rule, is too well settled at this day to be seriously questioned", noting that while some exceptions to the rule existed, it necessarily applied where a city employee had failed to perform a duty established by state statute. Johnson v. Municipality No. One, 5 La. Ann. 100 (1850). Similar decisions were issued prior to 1866 by state courts in

Illinois,[10] Indiana,[11] Maryland,[12] Ohio,[13] and Pennsylvania.[14] The North Carolina

---

[10] Browning v. City of Springfield, 17 Ill. 143-45 (1855) (municipalities "like individuals are liable for the negligent, unskillful acts of their servants and agents" where they are "charged with a full, specific and complete duty").

[11] City of Logansport v. Wright, 25 Ind. 512, 515 (1869) (where an act "is ministerial in its character" municipal corporations are liable for "the negligence or unskillfulness of their agents").

[12] Mayor, etc. of Baltimore v. Marriott, 9 Md. 160, 174-44 (1856) (upholding jury instruction imposing liability on city for lack of "ordinary care and diligence" by "its agents" because statute imposing duty on Baltimore placed it "upon the same footing which is held by individuals and private corporations ... and so are the consequences the same for its disregard").

[13] City of Dayton v. Pease, 4 Ohio St. 80, 99 (1854) (quoting Lloyd v. Mayor, etc. of New York).

[14] Dean v. New Milford Township, 5 Watts & Serg. (Pa.) 545, 546 (1843) (upholding claim against municipality because "whenever an individual has sustained injury by the misfeasance or nonfeasance of an officer who acts or omits to act, contrary to his duty, the law affords redress"). See also City of

Supreme Court, in an expansive view of the nature of a municipality's obligations, reasoned that any grant of power to a city implied a condition that actions taken pursuant to that grant would be performed "in a skillful and proper manner." Meares v. Commissioners of Wilmington, 31 N.C. 73, 81 (1848). A plaintiff injured by a violation of that duty was entitled to sue the city commissioners "as a corporation, in which capacity they procured the work to be done, and are liable for the damage done

---

Richmond v. Long's Administrators, 17 Gratt. (Va.) 375, 381 (1867) ("Wherever it can be said that distinct duties are imposed upon a [municipal] corporation, purely ministerial and involving no exercise of discretion, the same liability attaches as in the case of private persons owing the same service under the law. To this ... class belong numerous cases of recovery against corporations for the torts or negligence of their servants") (citing, inter alia, Weightman v. Washington and Mayor, etc. of New York v. Furze).

by their agent, under the rule respondeat superior." 31 N.C. at 79.

The principle of respondeat superior was also widely applied to delineate the scope of municipal liability where a city was subject to suit because of injuries occasioned by "proprietary" activities. The Ohio Supreme Court held that

> When a municipal corporation undertakes to ... construct[] improvements for the especial interest or advantage of its own inhabitants, the authorities are all agreed, that it is to be treated merely as a legal individual ... and subject to all the liabilities that pertain to private corporations or individual citizens.

City of Dayton v. Pense, 4 Ohio St. 80, 100 (1854). In such circumstances

> We have again and again affirmed, that the liabilities of corporations, private and municipal, are no less extensive, and that the maxim, respondeat superior, properly applies to them, in the same manner, and to the same extent, as in its application to the liabilities of private individuals.

4 Ohio St. at 95. In Tennessee, Mayor, etc. of Memphis v. Lasser, 28 Tenn. 757 (1849), held that where the object of a city activity was "to confer a direct benefit or convenience upon the inhabitants" or "to swell the revenues,"

> [m]unicipal corporations are ... liable for the wrongful acts and neglects of their servants and agents, upon the same grounds, in the same manner, and to the same extent as natural persons.

28 Tenn. at 761. The Indiana Supreme Court ruled in 1848:

> It may ... be considered settled law that municipal corporations are responsible to the same extent and in the same manner as natural persons for injuries occasioned by the negligence or unskillfulness of their agents in the construction of works for the benefits of the cities....

Ross v. City of Madison, 1 Ind. 281, 284 (1848). The Iowa Supreme Court agreed that

> [t]he doctrine that a municipal corporation is liable for malfeasance, or the negligence of its agents in the construction of public

> improvements upon precisely the same principle and under the same circumstances as the individual citizen ... may be regarded as well established.[15]

Cotes & Patchin v. City of Davenport, 9 Iowa 227, 235 (1859).[16] Similar decisions in the decades prior to 1866 are to be found in Alabama,[17] Illinois,[18]

---

[15] See also Logansport v. Wright, 25 Ind. 512, 515 (1865).

[16] See also Templin v. Iowa City, 14 Iowa 59, 60 (1862).

[17] Dargan v. Mayor of Mobile, 31 Ala. 469, 475-77 (1858) (city liable for "negligence," "misconduct" and "unskillful and incautious" acts of employees "where they are employed about its private interests; as, for instance in the improvement of its private property").

[18] Nevins v. City of Peoria, 41 Ill. 502, 515 (1866) ("a city in the management of corporate property must be held to the same responsibilities that attach to individuals for injury to the property of others ... respondeat superior ...").

Kentucky,[19] Louisiana,[20] Maine,[21] Maryland,[22] Michigan,[23] Missouri,[24] and

---

[19] Prather v. Lexington, 13 Ben. Monroe's Ky. Rep. 559, 560-61 (1852) ("cities are responsible to the same extent, and in the same manner, as natural persons for injuries occasioned by the negligence or unskillfulness of their agents in the construction of works for their benefit").

[20] Stewart v. City of New Orleans, 9 La. Ann. 461, 462 (1854) (a city "in the exercise of powers ... which are conferred upon it for private purposes ... is answerable for the acts of those who are in law its agents ... and ... is to be regarded as a private company").

[21] Small v. Inhabitants of Danville, 51 Me. 359, 362 (1864).

[22] County Commissioners of Anne Arundel County v. Duckett, 20 Md. 468, 476-77 (1863) (county "is responsible for the acts of those who are in law its agents" for injuries occurring in the exercise of "private franchises").

[23] City of Detroit v. Corey, 9 Mich. 165, 183-86 (1861) (where a city's "private purposes" or "private property" are envolved, "the rule of respondeat superior is applicable").

[24] City of St. Louis v. Gurno, 12 Mo. 414, 419-21 (1849) (city "liable for the negligence and unskillfulness of its agents" in activities "for her emolument

New York.[25]

In the mid-nineteenth century municipal liability was not consistently limited to conduct involving proprietary

---

or convenience").

[25] Mayor, etc. of New York v. Bailey, 2 Denio 433, 447 (Ct. of Errors 1845) ("municipal corporations ... have been held liable for the acts of their officers and agents of whom they had the appointment and supervision ... when the duty to be performed was for the benefit of the corporation"); Morey v. Town of Newfane, 8 Barbour 645 (Sup. Ct. 1850) ("The doctrine is now well settled that a municipal corporation ... enjoying franchises and privileges for its own convenience or benefit, is liable in a civil action for any injury resulting either from its misfeasance or that of its officers"); Delmonico v. Mayor, etc. of New York, 1 N.Y. Super. Ct. 222, 226 (1848) ("It has frequently been decided in this court, that the corporation of the city is liable for injuries occasioned by the negligence, unskillfulness or malfeasance of its agents and contractors, engaged in the construction of its public works"); Hickok v. Trustees of Plattsburgh, 15 Barbour (N.Y.) 427, 436 (Sup. Ct. 1853) (city is "responsible for its negligence or unskillfulness of its agents and servants when employed in the construction of a work for the benefit of the city or town") (emphasis in original).

activities or violations of legal duties; in those opinions apparently imposing liability without regard to the nature of the activity or duty involved, the principle of respondeat superior was also applied. In Pritchard v. Georgetown, 19 Fed. Cas. 1348 (C.C.D.C. 1819), the plaintiff complained that his property had been injured when city workers regraded the street beside his home; Chief Judge Cranch held that "if the act was done by the agents, ignorantly or negligently, the corporation [of Georgetown] is liable." 19 Fed. Cas. at 1349. The court in Anthony v. Adams, 42 Mass. 284, 285 (1840), observed:

> We can have no doubt that an action ... will lie against municipal corporations, when such corporations are in the execution of powers conferred on them, or in the performance of duties required of them by law, and their officers, servants and agents, shall perform their acts so carelessly, unskillfully or improperly, as to cause damage to others.

In Missouri, Hilsdorf v. City of St. Louis, 45 Mo. 94, 97 (1869), held:

> corporations, whether municipal or aggregate, are now held to the same liability as individuals, and will not be permitted to screen themselves behind the plea that they are impersonal, and their acts are but the acts of individuals; and if an agent or servant of a corporation, in the line of his employment, shall be guilty of negligence or commit a wrong, the corporation is responsible in damages.

(Emphasis in original). Similar statements can be found in a number of other opinions of this era.[26]

Respondeat superior doctrines permeated municipal liability litigation

---

[26] Roberts v. City of Chicago, 26 Ill. 249, 252 (1861); Allegheny County v. Rowley, 4 Clark (Pa.) 307, 308 (1849); City of Milwaukee v. Davis, 6 Wisc. 377, 387 (1858); Conrad v. Trustees of Ithaca, 10 N.Y. 158, 172-73 (1857); cf. Fowle v. Common Council of Alexandria, 28 U.S. (3 Pet.) 398, 409 (1830) (city not liable because wrongdoer not "the officer or agent of the corporation.")

in this era. Even when the alleged wrongdoer was a high ranking official, liability was premised on the fact that he was an employee acting within the scope of his employment, rather than on any notion that such officials were policy makers or otherwise unique.[27] In several instances claims against municipalities turned on the familiar question of whether the relevant employee was in fact acting within the scope of his employment,[28] and a large volume of litigation concerned whether particular workers were city employees, thus rendering appropriate the application of respondeat superior, or

---

[27] Hooe v. Alexandria, 12 Fed. Cas. 462 (C.C.D.C. 1802) (city street commissioner).

[28] Hooe v. Alexandria, 12 Fed. Cas. 462 (C.C.D.C 1802); Anthony v. Inhabitants of Adams, 42 Mass. 284, 286 (1840); Wilde v. City of New Orleans, 12 La. Ann. 15 (1857).

were independent contractors.[29] The application of respondeat superior to municipalities -- in those instances when they could be sued at all -- was consistent with the general nineteenth century practice of holding cities "to the same standards of liability as any private corporation." Owen v. City of Independence, 445 U.S. 622, 644 (1980).[30] In

---

[29] Nevins v. City of Peoria, 41 Ill. 502, 515-16 (1866); St. Paul v. Seitz, 3 Minn. 297 (1859); Barry v. City of St. Louis, 17 Mo. 121 (1852); Kelley v. Mayor, etc. of New York, 4 E.D. Smith (N.Y.) 291 293 (Ct. Com. Pleas 1855); Treadwell v. Mayor, etc. of New York, 1 Daly (N.Y.) 123, 127-28 (Ct. Com. Pleas 1861); Pack v. Mayor, etc. of New York, 8 N.Y. 222 (1853); Kelly v. Mayor, etc. of New York, 11 N.Y. 432, 435-36 (1854); Cincinnati v. Stone, 5 Ohio St. 38 (1855); Painter v. Pittsburgh, 46 Penn. St. 213, 220 (1863); Smith v. Milwaukee, 18 Wis. 63 (1864).

[30] See also Smoot v. City of Wetumpka, 24 Ala. 112, 121 (1854); Browning v. City of Springfield, 17 Ill. 143, 147-48 (1855); Creal v. City of Keokuk, 4 G. Greene (Iowa) 47, 50 (1853); Freeland v. City of Muscatine, 9 Iowa 461, 464 (1859); Wallace v. City of Muscatine, 4 G. Greene (Iowa) 373, 374-75 (1854);

Chicago v. Robbins, 67 U.S. (12 Black) 418 (1863), this Court held that it would be wrong to permit joint tortfeasor indemnification to be "determined by a different rule of decision from the rights of private persons," 67 U.S. at 425, merely because one of the tortfeasors was a municipality.

The principle of respondeat superior was applied, ironically, to claims by slaveowners that their slaves had been injured or been permitted to escape as a result of misconduct by city employees. In Johnson v. Municipality No. One, 5 La. Ann. 100 (1850), jail officials had violated their legal duty to advertise the name of any slave in their custody, and had failed to keep the slave at issue

---

City of Baltimore v. Marriott, 9 Md. 160, 174 (1856); City of St. Louis v. Gurno, 12 Mo. 414, 419 (1849); Rochester White Lead Co. v. City of Rochester, 3 N.Y. 463, 468 (1850).

under tolerable conditions. A Louisiana judge awarded the former slaveowner $600 for the death of a slave who became fatally ill while in the New Orleans jail:

> The disease was contracted in prison; ... it was aggravated by prison fare; and ... the circumstances in which the patient was found ... were neither fit nor decent for a human being of any color. I think a sufficiently strong case of omission of duty has been made out against the agents of the defendants.

5 La. Ann. at 101.[31] Surely if the doctrine of respondeat superior controlled a city's tort liability for injuries suffered by the "property" of slaveowners in violation of state law, Congress could not have intended to hold cities to a

---

[31] See also Clague v. City of New Orleans, 13 La. Ann. 275 (1858) (slaveowner entitled to recover from muncipality if her slave escaped as a result of "illegal" or "negligent" acts by "agents of the city"); Kelly v. City of Council of Charleston, 4 Rich. Law (S.C. 426, 433 (1850) (slaveowner claim for damages due to death of slave rejected because of lack of proof city employees had violated any "duty").

lesser standard of liability for harms to freedmen inflicted in violation of the 1866 Civil Rights Act.

The same conclusion is compelled if a particular claim under the 1866 Act sounds in contract, although the matter is considerably simpler. The sometimes elusive distinctions regarding when a city would be sued in tort never existed in contract; under the common law a principal was always liable for any breach of its contract occasioned by the act or omission of an agent or employee. This Court noted in Monell that counties and municipalities were regularly sued in federal court for violations of the financial undertakings in their bonds. 436 U.S. at 673 n. 28. In state court, coincidentally, the largest volume of contract claims against local government bodies were proceedings brought against cities or school boards by

teachers who had allegedly been wrongfully dismissed[32] or improperly denied their salaries.[33] Cf. Owen v. City of Independence, 445 U.S. at 639 and n. 19. In most of the successful wrongful discharge cases the courts found that the dismissal at issue violated the relevant city charter,

---

[32] Gilman v. Bassett, 33 Conn. 298 (1866); Shaw v. Mayor of Macon, 19 Ga. 468, 469 (1856) (city Marshall); City of Crawfordsville v. Hays, 42 Ind. 200 (1873); Inhabitants of Searsmont v. Farwell, 3 Me. 450 (1825); Mason v. School District No. 14, 20 Vt. 487 (1848); Richardson v. School District No. 10, 38 Vt. 602 (1866); Holden v. Shrewsbury School District No. 10, 38 Vt. 529 (1866).

[33] Neville v. School Directors of District No. 1, 36 Ill. 71 (1864); Botkin v. Osborne, 39 Ill. 101 (1866); Casey v. Baldridge, 15 Ill. 65 (1853); Trustees of Town of Milford v. Simpson, 11 Ind. 520 (1858); Harrison Township v. Conrad, 26 Ind. 337 (1866); Cross v. District Township of Dayton, 14 Iowa 28 (1862), Offut v. Bourgeois, 16 La. Ann. 163 (1861); Rolfe v. Cooper, 20 Me. 154 (1841); Batchelder v. City of Salem, 58 Mass. 599 (1849); George v. School District No. 8, 20 Vt. 493 (1848); Paul v. School District No. 2, 28 Vt. 575 (1856); Doyan v. School District, 35 Vt. 520 (1803).

or that the dismissal had been ordered by an official who lacked any authority whatever to fire a teacher. The state courts regarded such a lack of authority as establishing the plaintiff's right to recover, not, as in St. Louis v. Praprotnik, 99 L. Ed. 2d 107 (1988), as constituting some sort of affirmative defense.

If, in 1867, a public school teacher had been dismissed on account of race, it is clear that the teacher would have been entitled to relief under section 1981 against the school board or town for which he or she worked, without regard to the existence or absence of any relevant general policy or custom. The result would have been the same regardless of whether the teacher's claim was treated as an action in contract or in tort. Unless the adoption of the 1871 Civil Rights Act

has somehow changed the meaning of the 1866 Act, no proof of policy or custom is necessary today under section 1981.

II. THE RIGHTS AND REMEDIES CREATED BY THE 1866 CIVIL RIGHTS ACT WERE NOT ALTERED BY THE ADOPTION OF THE 1871 CIVIL RIGHTS ACT

Had the 1871 Civil Rights Act never been adopted, there would be no doubt that petitioner could prevail in this action without being required to prove the existence of any policy or custom. As originally enacted the 1866 Civil Rights Act created a cause of action against governmental bodies both for discriminatory acts pursuant to some official policy, and for discriminatory acts not rooted in such policies. The second type of claim may still be asserted by petitioner unless it was somehow repealed by the adoption of the 1871 Act.

"This Court has recognized, however, that 'repeals by implication are dis-

favored.'" Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1017 (1984). A party asserting that Congress intended any repeal by implications "bears a heavy burden of persuasion." Amell v. United States, 384 U.S. 158, 165-66 (1966). Such an implied repeal will be found only where there is "some manifest inconsistency or positive repugnance between the two statutes." Merrantile Nat. Bank v. Langdeau, 371 U.S. 555, 565 (1963). "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective." Morton v. Mancari, 417 U.S. 535 551 (1974); see Regional Rail Reorganization Act Cases, 419 U.S. 102, 133-34 (1974).

The court below did not purport to find any positive repugnance between

section 1983, as construed by Monell, and a broader form of liability under section 1981. It is entirely understandable that Congress would have chosen to utilize different principles of liability and responsibility under the two statutes. First, because section 1981 forbids only certain types of racial discrimination, and because racial discrimination is the evil that lies at the very heart of the three reconstruction era constitutional amendments, Congress might well have favored more stringent remedies under the section 1981 than it thought appropriate for the wide range of constitutional and statutory claims made actionable under section 1983. Second, because the types of conduct forbidden by section 1981 are specified in detail, while the substantive requirements enforceable under section 1983 are only incorporated by reference

and are considerably less clear, Congress could have believed that only in section 1981 cases would it be fair to apply the common-law doctrine of respondeat superior. Finally, because section 1981 extends to private as well as governmental conduct, a failure to apply common-law principles to government bodies would have created disparate results under the same statute; since, however, section 1983 reaches only action under color of law, no comparable problem arises under that provision.

In Monell this Court concluded that the "policy or custom" requirement of section 1983 was rooted in the language of the 1871 Civil Rghts Act imposing liability only on persons who "subject, or cause to be subjected, any person ... to the deprivation of any rights, privileges or immunities secured by the Constitu-

tion." 436 U.S. at 691-92 (emphasis added). But if that is how the forty-second Congress understood section 1 of the 1871 Civil Rights Act, it would surely have realized that section 1 of the 1866 Civil Rights Act would not be construed in the same manner, since the earlier statute clearly contains no such restrictive terms. Congress'- failure to amend the 1866 Act to add comparable language, conforming it to the 1871 Act, can only be understood as indicating an intent that the differently worded statutes would in fact have distinct meanings.

The Fifth Circuit read Monell to suggest that any federal law basing liability on the principle of respondeat superior would have raised in the mind of the forty-second Congress severe constitutional problems. 837 F.2d at 1247. In fact, however, Monell contains no such

holding, and no such conclusion would be warranted by either the debates on the Sherman amendment or the state of constitutional and common law principles in the mid-nineteenth century. Although the Sherman amendment did involve a species of vicarious liability, that was not the feature of the bill which the House found objectionable. Rather, as Monell made clear, critics of the amendment had reservations about the power of Congress to impose on state officials affirmative substantive duties to carry out federal law. Monell v. Dept. of Social Services, 436 U.S. at 673-83. The Sherman amendment was criticized, not because it imposed damages as such on cities and counties, but because the effect of those damages would have been to conscript local officials and government bodies into affording protection against the Ku Klux

Klan; those critics would have objected more, not less, strongly if the amendment, rather than establishing any civil cause of action, had instead directly and expressly imposed such a duty on local authorities.

Equally important, this constitutional argument -- at least in its most absolute version -- did not command the support of a majority of the House. After rejecting the Sherman amendment, the House adopted a substitute provision, now codified in 42 U.S.C. §1986, which did impose some affirmative duties. Section 1986 imposes liability on any person who, having the ability to prevent or aid in the prevention of certain offenses, "shall neglect or refuse to do so;" clearly the impact of that provision would, for example, create affirmative obligations for a sheriff or police official who was

aware that the Klan was conspiring to violate federal law. The distinction between the Sherman amendment and section 1986 is that the rejected amendment imposed liability even on cities and counties which lacked any authority or means under state law to stop the Klan or other rioters, while section 1986 imposes liability only on persons "having the power to prevent or aid in preventing" the specified offenses. Much of the criticism of the Sherman amendment emphasized that it applied to cities and counties that might in fact be powerless to stop the private misconduct at issue.[34]

Perhaps most significantly, members of the House criticized the type of liability proposed by the Sherman amend-

---

[34] Cong. Globe, 42nd Cong., 1st sess. 788 (Rep. Kerr), 791-93 (Rep. Willard), 795 (Rep. Blair), 795 (Rep. Burchard), 799 (Rep. Farnsworth) (1871).

ment precisely because it departed from the principles of liability ordinarily applicable to governmental and private defendants. Representatives Kerr, Willard and Poland referred approvingly to the then common civil litigation against cities, described above, for violations of their contracts and of state imposed duties, and objected that such actions were "a very widely different thing"[35] from the Sherman amendment. Representative Kerr denounced the amendment because it departed from "the common law" and "fundamental principles;"[36] Congressman Buchard asserted that the amendment was "altogether without a precedent in this country."[37] These objections would have

---

[35] Id. at 794 (Rep. Poland); see also id. at 789 (Rep. Kerr), 792 (Rep. Willard).

[36] Id. at 788.

[37] Id. at 795.

made no sense if the speakers harbored any reservations about the well established common-law doctrine of respondeat superior. Several members of the House acknowledged that the civil liability imposed by the Sherman amendment would be appropriate if cities were or could constitutionally be placed under a duty to keep the peace,[38] and distinguished the amendment from state statutes imposing liability on cities and counties whose officers and authorities had negligently or willfully failed to prevent riots.[39] These remarks bespeak an intent to adhere to, not to repeal by implication, the common law rules of liability.

---

[38] Id. at 791 (Rep. Willard), 795 (Rep. Burchard).

[39] Id. at 791 (Rep. Willard), 794 (Rep. Poland).

CONCLUSION

For the above reasons, the decision of the Fifth Circuit, insofar as it requires proof of an official policy or custom in a section 1981 action, should be reversed.

Respectfully submitted,

JULIUS LEVONNE CHAMBERS
ERIC SCHNAPPER*
NAACP Legal Defense &
Educational Fund
16th Floor
99 Hudson Street
New York, N.Y. 10013
(212) 219-1900

Counsel for Amici Curiae

*Counsel of Record

Supreme Court, U.S.
FILED
JAN 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-2084 and 88-214

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

NORMAN JETT,
Petitioner,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MICHAEL H. GOTTESMAN
JEREMIAH A. COLLINS *
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-... 10

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	7
CONCLUSION	24

TABLE OF AUTHORITIES

Cases — Page

American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982) 20
Anderson v. Methodist Evangelical Hospital, Inc., 464 F.2d 723 (6th Cir. 1972) 19
Baker v. McCollan, 443 U.S. 137 (1979) 16
Calcote v. Texas Educational Foundation, 578 F.2d 95 (5th Cir. 1978) 19
Capaci v. Katz & Besthoff, Inc., 711 F.2d 647 (5th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984) 19
Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979) 15
City of Canton v. Harris, No. 86-1088 (pending) 4, 10, 23
City of Kenosha v. Bruno, 412 U.S. 507 (1973) 14
City of Newport v. Fact Concerts Inc., 453 U.S. 247 (1981) 21
City of St. Louis v. Praprotnik, —— U.S. ——, 108 S. Ct. 915 (1988) ..... *passim*
City of Springfield v. Kibbe, 480 U.S. 257 (1987) 4, 10
Daniels v. Williams, 474 U.S. 327 (1986) 14, 16
DeGrace v. Runmsfeld, 614 F.2d 796 (1st Cir. 1980) 19, 20
Fain v. District of Columbia, 568 F. Supp. 799 (D.D.C. 1983) 19
Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977) 19
General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) 5, 17
Hall v. Gus Const. Co., Inc., 842 F.2d 1010 (8th Cir. 1988) 19, 20
Hamilton v. Rodgers, 791 F.2d 439 (5th Cir. 1986) 19
Hatrock v. Jones, 750 F.2d 767 (9th Cir. 1984) 21
Hazelwood School District v. Kuhlmeier, —— U.S. ——, 108 S. Ct. 562 (1988) 12, 13
Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) 19
Hudson v. Palmer, 468 U.S. 517 (1984) 13, 14
Hunter v. Allis-Chalmers Corp., 797 F.2d 1417 (7th Cir. 1986) 19, 20

TABLE OF AUTHORITIES—Continued

Page

Kentucky v. Graham, 473 U.S. 159 (1985) 7, 11
Machinists v. Labor Board, 311 U.S. 72 (1940) 17
Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) 19
Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) 19
Mitchell v. Keith, 752 F.2d 385 (9th Cir.) *cert. denied*, 472 U.S. 1028 (1985) 19
Monell v. Department of Social Services, 436 U.S. 658 (1978) ..... *passim*
Monroe v. Pape, 365 U.S. 167 (1961) 7
NLRB v. Yeshiva University, 444 U.S. 672 (1980) 21
Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 4, 9, 10, 16, 18
Parratt v. Taylor, 451 U.S. 527 (1981) 13, 14
Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) ..... *passim*
Protectus Alpha Nav. v. Pacific Grain, 767 F.2d 1379 (9th Cir. 1985) 20, 21
Smith v. Little, Brown & Company, 272 F. Supp. 870 (S.D.N.Y. 1967), *aff'd*, 396 F.2d 150 (2d Cir. 1968) 21
Tinker v. Des Moines School District, 393 U.S. 503 (1969) 12
Washington v. Davis, 426 U.S. 229 (1976) 17
Williamson Planning Comm'n. v. Hamilton Bank, 473 U.S. 172 (1985) 15
Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987) 14

Constitution, Statutes and Regulations

U.S. Constitution, Amendment XIV ..... *passim*
42 U.S.C. § 1981 ..... *passim*
42 U.S.C. § 1983 ..... *passim*
Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e 6, 18, 19, 20
29 C.F.R. § 1604.11 ..... 19, 20

TABLE OF AUTHORITIES—Continued

Miscellaneous	Page
Restatement (Second) of Agency, § 217C (1958)	20
Restatement (Second) of Contracts, § 235(2) (1979)	15
Restatement (Second) of Torts, § 909(c) (1979)	20
J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice* (1987)	21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-2084 and 88-214

NORMAN JETT,
Petitioner,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief *amicus curiae* is filed by the National Education Association (NEA) with the consent of the parties pursuant to Rule 36.2 of the Court.

STATEMENT OF INTEREST

NEA is a nationwide employee organization with a current membership of some 1.9 million members, the vast majority of whom are employed by public educational institutions. NEA operates through a network of affiliated organizations: it has as state affiliates organizations in each of the 50 States, the District of Colum-

bia and Puerto Rico, and it has approximately 12,000 local affiliates in individual school districts, colleges and universities throughout the United States. One of the principal purposes of NEA and its affiliates is to protect the constitutional and statutory rights of teachers, professors and other educational employees, including the right to be free from racial discrimination in employment. Because the Court is being asked to decide issues of vital importance to the effective vindication of these rights, NEA has a substantial interest in the outcome of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

At bottom, the question in this case—a question that arises in numerous contexts at common law and under many statutes and constitutional provisions—may be put as follows: given that an employer or other entity can act only through human agents, when is it proper, in a case that turns on motive, to hold an employer liable on the basis of the impermissible motive of one of its agents? The question arises here under the Equal Protection Clause of the Fourteenth Amendment (as enforced through 42 U.S.C. § 1983), and under 42 U.S.C. § 1981, in the context of the removal of a public employee from his position with the school district for what were found to have been racially discriminatory reasons.[1]

The thrust of our submission is that in the final analysis, the answer to this question is to be found in the *substantive* provisions that plaintiff seeks to enforce—here, § 1981 and the Equal Protection Clause—rather than in the *procedural* provision, § 1983, that provides the enforcement mechanism for one of plaintiff's claims. Thus, as we will show, the Court of Appeals proceeded

[1] The jury also found that plaintiff's removal was based in part on his exercise of First Amendment rights. As it is not clear whether the questions on which certiorari was sought and granted include the First Amendment issue, we do not address it.

on the wrong track in taking the view that the concept of "policymaking" developed in the line of § 1983 cases beginning with *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and extending through *City of St. Louis v. Praprotnik*, —— U.S. ——, 108 S. Ct. 915 (1988), provides the answer to the question presented here.

Our argument proceeds as follows:

1. The predicate for the Court's adoption in *Monell* of the "official policy" doctrine was the Court's conclusion that a governmental entity should not be held liable under § 1983 by application of the doctrine of *respondeat superior*, which would "impos[e] liability on an employer for the torts of an employee when the sole nexus between the employer and the tort is the fact of the employer-employee relationship." *Monell*, 436 U.S. at 693. Finding that such an imposition of liability would be inconsistent with the language and history of § 1983, the Court fashioned the "official policy" requirement "to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986) (emphasis by the Court). Thus, under *Monell*, "recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality'—that is, acts which the municipality has officially sanctioned or ordered." *Id.* *See infra* at 7-9.

2. In many § 1983 cases, where the injury to the plaintiff consists simply of the acts of certain individuals which do not inherently involve official action of the governmental entity, and which would inflict precisely the same harm whether or not they were adopted or effectuated in any way by the entity, the concept of final policymaking authority as developed in *Pembaur* and *Praprotnik* may provide a necessary and appropriate analysis

for determining whether the injury may fairly be said to be due to an act "of the municipality." This is true, for example, when the plaintiff's complaint concerns a shooting or other such misconduct by a law enforcement officer, as in *Pembaur, supra*, *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), and *City of Springfield v. Kibbe*, 480 U.S. 257 (1987). *Cf. City of Canton v. Harris*, No. 86-1088 (pending). *See* infra at 9-10.

But there is another category of cases, exemplified by the case at bar, in which the actions of the individual wrongdoers gain their power to injure the plaintiff *only because the government, through its official decision-making processes, elects to translate those actions into official action of the government.* In this case, for example, the statements, recommendations and decisions of the various School District agents worked a constitutional injury on plaintiff Jett *only because those actions were treated by the Dallas Independent School District as operating to terminate Jett's status with the District* as coach and athletic director. Thus, this is not a case where "the sole nexus between the employer and the tort is the fact of the employer-employee relationship," *see supra* at 3; rather, it is a case where the injury *necessarily* is an act of the governmental entity. In the language of *Pembaur*, the School District, by treating Jett as no longer its coach and athletic director, has "officially sanctioned" his removal, and "is actually responsible" for it. *See infra* at 10-11.

This point is confirmed by the fact that the injury of which Jett complains could only be remedied by an order restoring him to his position—an order that could be entered *only against the School District.* The fact that only the District can remedy the wrong is a sure indication that the wrong is an act of the District. *See infra* at 11-12.

The argument we advance was not addressed in *Monell*, *Praprotnik*, or any of the other cases in which this Court has elaborated on the "official policy" concept.

And, several decisions of the Court support our view that in circumstances such as those presented here, an act of an agent necessarily constitutes an act of the governmental entity even if the agent does not possess final policymaking authority. *See infra* at 12-15.

For these reasons, the limitations on governmental liability set out in § 1983, as construed in *Monell*, necessarily are satisfied in a case of this sort, because the injury involved is inherently an action of the government; and there accordingly is no need to determine whether the particular individuals involved in the government's decisionmaking process were "policymakers."

3. But this does not exhaust the inquiry. For § 1983 is a *procedural* statute, which does not provide any rights on its own; and the question whether the plaintiff has proved the elements of an actionable claim, including any applicable requirement of state-of-mind, is to be answered in the final analysis not by reference to § 1983, but by examining the *substantive* statutory or constitutional provisions on which the suit is based—here, the Equal Protection Clause and § 1981. *See infra* at 15-16. Because both of those provisions turn on proof of a discriminatory purpose, the question becomes one of determining the circumstances in which it would effectuate the purposes of the Equal Protection Clause and § 1981 to impute the motivation of a particular human actor to the governmental entity.

In a case of this sort, where the considerations that *Monell* recognized as arguing against the application of *respondeat superior* are not present, a strong argument can be made that it is appropriate under the Equal Protection Clause and § 1981 to impute to an employer the motivation of *any* agent who has played a "but-for" part in the employer's decision. At least some members of the Court appear to have adopted that view of § 1981 in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982).

But to resolve this case it is sufficient to travel only a part of the way: *viz.*, to recognize that for the purposes of § 1981 and the Equal Protection Clause, the improper motive of an agent should be attributed to a governmental entity *when the entity's decisionmaking process has been so structured as to rely upon the discretion of that agent.* If a governmental entity creates a situation where the discretionary judgments of a particular individual will control the entity's course of action, the core command of both § 1981 and the Equal Protection Clause that the government not make decisions based on intentional discrimination compels a holding that the governmental entity is liable when it takes action on the basis of the discriminatorily motivated decision of that individual. *See infra* at 17-18.

This approach is consistent with the rules applied in analogous situations, including Title VII. On the other hand, to resolve the question by reference to the *Praprotnik* definition of "official policy," and thus to construe § 1981 and the Equal Protection Clause as leaving the government free to effectuate the discriminatorily motivated decisions of all but its "final policymakers," would be unfounded. *See infra* at 18-23.

4. Applying this approach, the judgment against the School District was proper and should be reinstated. *See infra* at 23.

ARGUMENT

I. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Court overruled *Monroe v. Pape*, 365 U.S. 167 (1961), "insofar as it holds that local governments are wholly immune from suit under § 1983." 436 U.S. at 663. At the same time, the Court "uph[e]ld *Monroe* . . . insofar as it holds that the doctrine of *respondeat superior* is not a basis for rendering municipalities liable under § 1983 for the constitutional torts of their employees." *Id.* at 663-64 n.7.

The Court's rejection of *respondeat superior* as a basis for governmental liability[2] under § 1983 was predicated on two considerations, *id.* at 691-94: (i) the language of § 1983, which extends liability only to defendants who "subject [the plaintiff] or cause [him] to be subjected" to a deprivation of rights, and (ii) the refusal of the 1871 Congress to enact the Sherman Amendment, which would have made local governments responsible for damages inflicted by private parties in a riot.[3] *See also Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-81 (1986). Reasoning from those two points,[4] the Court held that a

[2] Although *Monell* and subsequent cases often speak of "municipal" liability, the *Monell* doctrine applies to all governmental bodies that are suable under § 1983, including states (when sued directly in cases where the Eleventh Amendment is inapplicable, or indirectly by naming as defendant a state officer in his official capacity, *see Kentucky v. Graham*, 473 U.S. 159, 166-67 and n.14 (1985)), and school boards, *see Monell*, 436 U.S. at 662-63. For simplicity, we will refer to all such defendants as "governments."

[3] *See id.* at 666-68, 679 (opinion of the Court); *id.* at 706 (Powell, J., concurring).

[4] The Court acknowledged that "the fact that Congress refused to impose vicarious liability for the wrongs of a few private citizens does not conclusively establish that it would similarly have refused to impose vicarious liability for the torts of a municipality's employees," *Monell*, 436 U.S. at 693 n.57; but the Court stated that "the inference that Congress did not intend to impose such liability is quite strong," *id.*

governmental entity cannot be held liable under § 1983 "*solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell*, 436 U.S. at 691 (emphasis by the Court). *See also id.* at 692 (government cannot be held liable "solely on the basis of the existence of an employer-employee relationship with a tortfeasor"); *id.* at 693 (*respondeat superior* would "impos[e] liability on an employer for the torts of an employee when the sole nexus between the employer and the tort is the fact of the employer-employee relationship").

Having rejected the applicability of *respondeat superior*, the Court adopted in its place the following standard:

> We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 694.

As the Court has subsequently explained:

> The "official policy" requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. *Monell* reasoned that recovery from the municipality is limited to acts that are, properly speaking, acts "of the municipality"—that is, acts which the municipality has officially sanctioned or ordered.

Pembaur, supra, 475 U.S. at 479-80 (footnote omitted) (emphasis by the Court).[5] *See also City of St. Louis v. Praprotnik*, —— U.S. ——, 108 S. Ct. 915, 933 n.3 (1988) (opinion of Brennan, J., joined by Marshall and Blackmun, JJ.) (*Monell* "did not employ the policy requirement as an end in itself, but rather as a means of determining which acts by municipal employees are properly attributed to the municipality").[6]

II. The teaching of *Monell* can be properly applied only by recognizing a fundamental distinction between two categories of cases.

A. In one category are cases where the injury to the plaintiff consists simply of the acts of certain individuals which do not necessarily constitute an official act of the

[5] The Court noted that this understanding of the "policy" requirement is reflected in the fact that "[the Court's] statement of the conclusion [in *Monell*] juxtaposes the policy requirement with imposing liability on the basis of *respondeat superior*." *Id.* at 1298 n.8.

[6] In subsequent cases where the Court has been called upon to flesh out the contours of the *Monell* "policy" requirement, no opinion has commanded a majority of the Court. *See Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Pembaur, supra*; *Praprotnik, supra*. In *Prapratnik*, however, a majority of the Court subscribed to the proposition that only those officials who have "final policymaking authority" may by their actions subject the government to § 1983 liability. *Praprotnik*, 108 S. Ct. at 924 (opinion of O'Connor, J., joined by Rehnquist, C.J., and White and Scalia, JJ.); *id.* at 932 (opinion of Brennan, J., joined by Marshall and Blackmun, JJ.). On the other hand, it is clear that such a policymaker need not actually be making policy in order for the government to be held liable—at least not if the term "policy" is given its common meaning as a rule that is "intended to control decisions in later situations." *See Pembaur*, 475 U.S. at 480 (opinion of Brennan, J., writing for the Court on this point). *See also Praprotnik*, 108 S. Ct. at 932 (opinion of Brennan, J., joined by Marshall and Blackmun, JJ.) (government may be held liable even if the challenged action "[does not] reflect[] generally applicable 'policy' as that term is commonly understood . . . ."); *id.* at 948 (Stevens, J., dissenting).

governmental entity, and which would inflict precisely the same injury whether or not they were adopted or effectuated in any way by the entity. Examples of such cases are complaints about alleged misconduct by law enforcement officers such as shootings, *see Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *City of Springfield v. Kibbe*, 480 U.S. 257 (1987), and improper invasion of private property, *see Pembaur, supra. Cf. City of Canton v. Harris*, No. 86-1088 (pending). In such cases, the wrong does not depend for its existence on any act by the government as such; a private person is fully capable of shooting a gun (*Tuttle*) or chopping down a door (*Pembaur*). The question necessarily posed by such a case is whether the wrong inflicted by the person wielding the gun or the axe should be attributed to the government, solely because of the relationship between that person and the government. In the language of *Pembaur*, a shooting or the chopping down of a door is not inherently an act "of the municipality," 475 U.S. at 478; and in the language of *Monell*, such a case poses the possibility that the government may be held liable "*solely* because it employs a tortfeasor," *i.e.*, "solely on the basis of the existence of an employer-employee relationship with a tortfeasor," "when the sole nexus between the employer and the tort is the fact of the employer-employee relationship." 436 U.S. at 691-93 (emphasis by the Court). The requirement of *Monell* that the plaintiff's injury be linked to a "policy" of the government provides a vehicle for avoiding such a result.

B. But there is a second category of cases, exemplified by the case at bar, in which the actions of the individual wrongdoers inflict an injury upon the plaintiff *only because the government, through its official decisionmaking processes, elects to translate those actions into official action of the government.*

1. For example, in this case the statements, recommendations and decisions of Principal Todd and Superintendent Wright worked a constitutional injury on Jett *only because those actions were treated by the Dallas Independent School District as operating to terminate Jett's status with the District* as coach and athletic director. The injury arose only because the statements, recommendations and decisions of Todd and Wright were adopted as *the action of the School District*, in the very real sense that they were treated by the District as operating to alter Jett's employment relationship *with the District.*[7]

Thus, whether or not the actions of Todd and Wright, standing alone, would be matters for which "the municipality is actually responsible," *Pembaur*, 475 U.S. at 479-80, the *termination of Jett's contract with the School District* is, by definition, such a matter. The School District, by treating Jett as no longer its coach and athletic director, has "officially sanctioned," *id.* at 480, his removal from that position.

2. The fact that the injury complained of in this case is the act of the School District, rather than merely the act of some employee, is further confirmed by a consideration of the remedies that would be required to undo the injury. Damages for a shooting or for breaking down a door or ransacking a room may be recovered by way of an order against the tortfeasor in his individual capacity; but Jett could be restored to his position as coach and athletic director only by an order against *the School District* (or by an order against District officers in their official capacities, which, under *Kentucky v. Graham*, 473 U.S. 159, 166 (1985), would be the same

[7] If the School Board, as the ultimate governing body of the School District, had voted to remove Todd, there could be no question but that his removal constituted an official act of the District. In this case, where by operation of the District's official rules the decision of the Superintendent automatically became the final action of the District without the need for a vote of the Board, the situation is analytically indistinguishable.

for *Monell* purposes as an order against the District itself). The fact that only the government can remedy an injury is surely confirmation that the injury is an "act of the municipality."

In sum, in cases of this sort, the actions that are the subject of the complaint are not mere actions of an individual who is proceeding on his own, but necessarily are acts "which the municipality has officially sanctioned or ordered," *Pembaur*, 475 U.S. at 480, and acts "for which the municipality is actually responsible," *id.* at 479-80. It follows that there is no need in such a case to inquire whether the particular individuals who made the recommendations and decisions upon which the municipality acted were "policymakers." *Cf. Praprotnik*, 108 S. Ct. at 932 (opinion of Brennan, J., joined by Marshall and Blackmun, JJ.) (describing another type of § 1983 case in which "the municipal policy inquiry is essentially superfluous").

3. We acknowledge that the foregoing analysis is not consistent with the opinions in *Praprotnik*, a case which involved an employment relationship. *See supra* note 6. However, this line of argument was not addressed by any of the opinions in *Praprotnik*. And, prior decisions of this Court are consistent with our view that in a proper case, an action must be seen as the act of a governmental entity without regard to whether the person formulating the action was a "policymaker."

For example, in *Tinker v. Des Moines School District*, 393 U.S. 503 (1969)—a case cited in *Monell* as an example of governmental liability, *see* 436 U.S. at 663 nn. 5 & 6 (opinion of the Court); *id.* at 711-12 (Powell, J., concurring)—this Court entertained a § 1983 action against a school district based on the actions of the school principals, 393 U.S. at 504, 510, without pausing to consider whether the principals were policymakers. Similarly, in *Hazelwood School District v. Kuhlmeier*, —— *U.S.* ——,

108 S. Ct. 562 (1988), the Court, in determining "when *a school* may refuse to lend its name and resources to the dissemination of student expression," *id.* at 570 (emphasis added), held that the question was to be resolved by reference to the actions of the "educators" involved, *id.* at 571—in that case, the actions of one principal, *id.* at 571-72. Although the case did not directly present a question of individual versus entity liability, the Court plainly viewed the actions of the principal as the actions of "[the] school," without first determining whether the principal was a policymaker.

So too, in *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984), the Court viewed the deprivation of property by a state agent as an act of the state, without regard to whether the agent responsible for the deprivation was a policymaker.[8] And,

[8] In *Parratt*, the persons allegedly responsible for the loss of the plaintiff's property were the Warden and Hobby Manager of a prison, *see* 451 U.S. at 530, while in *Hudson* the persons responsible were simply correctional officers, *see* 468 U.S. at 519. The Court held that where such agents deprive a person of property, "the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy," *id.* at 533. The Court reached this result, rejecting a proposed requirement of predeprivation process, on the ground that "the state" had not been in a position to provide for predeprivation process, *id.* at 534. Yet the Court made it clear that the initial deprivation itself was "attributable to the State . . . [even though it was] . . . beyond the control of the State," *id.* at 532, quoting *Parratt*, 451 U.S. at 541; and the Court plainly regarded the acts of the correctional officers as constituting one step in "the state's action," *Hudson*, 468 U.S. at 533. *See also Parratt*, 451 U.S. at 540 ("some kind of hearing is required at some time before *a State* finally deprives a person of his property rights") (emphasis added); *Hudson*, 468 U.S. at 539 (O'Connor, J., concurring) ("The Constitution requires *the government*, if it deprives people of their property, to provide due process of law . . .") (emphasis added). Thus, in both *Parratt* and *Hudson* the Court viewed the act of a state agent in depriving a person of property as an act of the state, even though the agent (at least in *Parratt*) was not a policymaker; and the Court held that the

in *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S 418 (1987), the Court held that tenants of a public housing authority had a cause of action under § 1983 against the Authority for their having been overbilled for utilities in violation of the Brooke Amendment to the Housing Act of 1983, which sets a cap on the rent a public housing authority may charge. The Court did not find it necessary to inquire as to whether a "policymaker" had been responsible for the overbilling.

The reason that the Court saw no need to apply a policymaking requirement in the cases just discussed is evident. If a student is improperly denied the right to attend a public school for a period of time (*e.g.*, *Tinker*), it would make no sense to require the student to prove, as a precondition to obtaining an order requiring the school district to reinstate him, that the person who suspended or expelled him was a policymaker.[9] Similarly, if a public housing authority receives excessive rent payments from a tenant in violation of the Brooke Amendment, it cannot be that the tenant's right to compel the authority to disgorge the excess payments rests on whether a policymaker was responsible for exacting the overpayment. And, by the same token, if property is taken by a governmental officer for the use of the government and just compensation is not paid, it cannot be

deprivation so accomplished would be actionable under § 1983 if the state failed to provide due process for its agent's action. (The Court has subsequently overruled *Parratt* to the extent that the case held that a merely negligent loss of property may constitute a "deprivation." *Daniels v. Williams*, 474 U.S. 327 (1986). This casts no doubt on *Hudson*, which involved intentional destruction of property; nor does it affect the portions of *Parratt* discussed above.)

[9] The same would hold true insofar as damages are concerned, because there is "nothing . . . to suggest that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them." *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973).

that the right to sue the government for such compensation[10] rests on whether the taking was the act of a policymaker.

There is no occasion here to enumerate or to define with precision the various categories of cases in which an injury can be determined to be an act of the government without regard to the policymaking status of the individuals who recommended or decided upon the action that inflicted the injury.[11] For the reasons discussed, this plainly is such a case, and the requirement of § 1983 that the defendant must have "subjected or caused to be subjected" the plaintiff to injury has been satisfied.

III. But the fact that a claim may be maintained under § 1983 does not answer the question whether the government has violated the constitutional or statutory rights on which the plaintiff's claim is based. Section 1983, after all, is a "procedural" provision, *see Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600,

[10] Suits for a taking without just compensation are brought under § 1983. *See, e.g., Williamson Planning Comm'n. v. Hamilton Bank*, 473 U.S. 172 (1985).

[11] It may be observed that many of the cases under discussion, including employment cases, involve a relationship between the plaintiff and the government that is contractual in nature. In such a case, the concern animating *Monell*, *i.e.*, that a government should not be held liable on the basis of the tort doctrine of *respondeat superior* for the "constitutional torts" of its employees, may be beside the point. The more appropriate common law analogy may be to contract law. If a party to a contract with an entity (governmental or otherwise) is deprived of the performance of the entity's obligations under the contract due to some act of an agent of the entity, the entity is to be held liable, without any need for resort to a concept of *respondeat superior*. *See generally* Restatement (Second) of Contracts, § 235(2) (1979) ("when performance of a duty under a contract is due any non-performance is a breach.") It would not occur to anyone to suggest in such a case that the entity should be excused from liability because the breach of contract was "only" the act of an agent. Certain property relationships (*e.g.*, use of one's property by and for the state) may lend themselves to a similar analysis.

617 (1979), that "does not provide any rights at all," *id.* at 618, but only provides a remedy for violations of other federal statutes or the Constitution. *See also Oklahoma City v. Tuttle, supra*, 471 U.S. at 816 (opinion of Rehnquist, J.); *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). Thus, while § 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right," *Daniels v. Williams*, 474 U.S. 327, 329-30 (1986), "in any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right . . . ," *id.* at 330.

A. The question whether the elements of a violation, including any requisite state of mind, have been made out as against a particular defendant therefore must be answered not by reference to § 1983, but by examination of the underlying statutory or constitutional provision invoked. And, where the defendant is a governmental entity that can act only through human agents, the question whether the elements of a violation have been made out against *the entity* by virtue of the actions of particular individuals must be answered by reference to the same statutory or constitutional source.

There is no reason to think that any single concept—and certainly not the notion of "policymaking" as defined in *Praprotnik*—will provide a unitary rule for determining when it is appropriate to impute various actions or states of mind of particular individuals to a governmental entity for purposes of assigning liability under the many different statutory and constitutional provisions that are enforceable through § 1983. In some cases, for example, the rights at issue may not turn on questions of motivation or purpose at all, and a kind of strict liability may be involved.[12] In other cases more complex

[12] That would certainly appear to be true of regulatory statutes such as the Brooke Amendment, discussed *supra* at 14. It would also appear to be true of procedural due process requirements. *See supra* note 8.

elements will need to be proved, including a particular state of mind. In some such cases there may be reason to hold an entity responsible for the conduct or motives of particular persons even though such conduct or motives would not be attributable to the entity under common law agency principles.[13] In other cases, common law principles may provide a proper rule. And in others, some different approach altogether may be dictated by the particular statutory or constitutional provision involved.

In the present case, Jett's [redacted] race discrimination claim is based on the Equal Protection Clause, which requires a showing of discriminatory purpose, *see Washington v. Davis*, 426 U.S. 229 (1976), and on § 1981, which requires the same kind of showing, *see General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982) ("§ 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination"). The question thus becomes one of determining the circumstances in which the discriminatory motivation of an agent may render an entity liable under those two provisions.

B. In *General Building Contractors, supra*, the Court assumed, without deciding, that the motive of any agent, or at least any "servant," may be imputed to an employer under § 1981, in accordance with common law principles of *respondeat superior*. *Id.* at 392, 395. Justice O'Connor, joined by Justice Blackmun, suggested even more strongly that the plaintiffs could seek to establish "the employers' liability under § 1981 by attempting to prove the traditional elements of *respondeat superior*." *Id.* at 404 (concurring opinion). Because *respondeat su-*

[13] *Cf. Machinists v. Labor Board*, 311 U.S. 72, 80 (1940) ("The employer . . . may be held to have assisted the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of *respondeat superior*").

perior was well-established in the common law when the Fourteenth Amendment and § 1981 were adopted, *see Oklahoma City v. Tuttle*, *supra*, 471 U.S. at 835-38 (Stevens, J., dissenting), and because the considerations that led the Court to reject *respondeat* in construing § 1983 are not applicable here, *see supra* at 7-15, there is much force to the argument that *respondeat* should apply with full force in determining when the discriminatory motivation of a human agent is to be attributed to a governmental entity for purposes of both the Equal Protection Clause and § 1981.

C. To resolve this case, however, it is not necessary to embrace that broad proposition; for it is enough to recognize that if the decisionmaking process of a governmental entity has been so structured as to rely on the discretion of a particular agent to determine the course the entity will take, the motivation that animates the agent in exercising his discretion must be regarded as *the entity's* motivation for purposes of § 1981 and the Equal Protection Clause. This rule reflects the fact that the motivation of an entity can *only* be the motivation of some human agent; and it is based on the sensible proposition that the entity must accept responsibility when it has created a situation in which the motivation of a particular individual is allowed to control the entity's actions. In such a case, the core command of both § 1981 and the Equal Protection Clause that the government not make decisions based on intentional discrimination requires holding that the governmental entity is liable.

1. This would comport with the approach generally followed by the courts in Title VII cases where questions of discriminatory intent, quite like those presented under § 1981 and the Equal Protection Clause, are raised. It certainly is not the law under Title VII that an employer is responsible only for the discriminatorily motivated acts of "final policymakers." Rather, as a general rule under Title VII, an employer is liable for the discriminatory conduct of any *supervisor* acting within the scope of his employment (*i.e.*, any supervisor who is exercising the discretion conferred upon him to take actions affecting the employment of those he supervises). *See, e.g.*, *Hamilton v. Rodgers*, 791 F.2d 439, 444 (5th Cir. 1986) (employer held liable under Title VII even though the court did not regard the "policy" requirement of § 1983 as having been satisfied); *Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723, 725 (6th Cir. 1972) ('where a discharge by a person in authority at a lower level of management is racially motivated, Title VII provides the aggrieved employee with a remedy [against the employer]"); *Mitchell v. Keith*, 752 F.2d 385, 389 (9th Cir.), *cert. denied*, 472 U.S. 1028 (1985); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977); *Calcote v. Texas Educational Foundation*, 578 F.2d 95, 98 (5th Cir. 1978); *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 660 (5th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984).[14] The employer is not, however, generally liable under Title VII for the discriminatory conduct of an "ordinary employee," [15] even though it could

[14] This general rule has been applied in all areas of Title VII law, including cases of racial or sexual harassment. *See, e.g.*, 29 C.F.R. § 1604.11(c) (sexual harassment); *DeGrace v. Rumsfeld*, 614 F.2d 796, 803 (1st Cir. 1980) (race); *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982) (sex); *Hall v. Gus Const. Co., Inc.*, 842 F.2d 1010, 1016 (8th Cir. 1988) (sex); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979) (sex). However, in some harassment cases the employer is held not to be liable because the supervisor is found to have acted "outside the actual or apparent scope of the authority he possesses as supervisor." *Henson*, *supra*, 682 F.2d at 910. Thus this Court has noted that employers are not "always automatically liable for sexual harassment by their supervisors." *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

[15] *Henson v. City of Dundee*, *supra* note 14, 682 F.2d at 910. *See also Hall v. Gus Const. Co.*, *supra* note 14, 842 F.2d at 1015; *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421 (7th Cir. 1986); *Fain v. District of Columbia*, 568 F. Supp. 799, 804 (D.D.C. 1983). Of

be argued that a strict application of *respondeat superior* would call for liability in such a case as well.

Also instructive in this connection is the prevailing rule with respect to liability of an entity for punitive damages. Although there have been a multitude of approaches, both in 1871 and today, to the question of awarding punitive damages against an entity for the acts of an agent, *see American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982), the majority view, adopted in both the Restatement (Second) of Torts and the Restatement (Second) of Agency, is that a principal is not liable for punitive damages on the basis of the acts of *every* agent, but *is* liable for such damages on the basis of the acts of an "agent . . . employed in a managerial capacity." Restatement (Second) of Torts, § 909(c) (1979); Restatement (Second) of Agency, § 217C(c) (1958).[16] This rule is intended to impose liability on a corporation or other employer for the actions of agents who hold "important positions," *see* Restatement (Second) of Torts, *supra*, § 909, Comment b; and the concept of "managerial agent" has therefore been applied broadly to encompass persons who clearly would not satisfy the "final policymaker" test of *Praprotnik*. *See, e.g., Protectus Alpha Nav. v. Pacific Grain*, 767 F.2d 1379, 1387 (9th Cir. 1985) (dock foreman was a managerial agent because he "performed a supervisory role, managing several employees," and "exercised a considerable amount of authority and discretion"); *Hatrock v. Jones*, 750 F.2d 767 (9th Cir. 1984) (*de facto* manager of a branch office of a brokerage firm was a managerial agent even though he was only a limited partner, was not licensed as a branch manager, and managed only one of the firm's 530 field offices); *Smith v. Little, Brown & Company*, 273 F.Supp. 870, 873 (S.D.N.Y. 1967), *aff'd.*, 396 F.2d 150 (2d Cir. 1968) (head of one department of a publishing house was a managerial agent because she was "a supervisory employee," *id.* at 873, even though she was not an officer of the company, *id.* at 871, and was not part of "management" as such, *id.* at 873. *Cf. NLRB v. Yeshiva University*, 444 U.S. 672 (1980) (all faculty members at a university were "managerial" for purposes of the National Labor Relations Act). In determining whether an agent is managerial, the courts have focused particularly on whether the agent is allowed to exercise *discretion*. *See* J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice* (1987), § 24.05 at 15 ("The key . . . in determining whether an agent acts in a managerial capacity is to look at what the individual is authorized to do by the principal and to whether that agent has discretion as to both what is done and how it is done"); *Protectus Alpha Nav. v. Pacific Grain*, *supra*, 767 F.2d at 1387.

Punitive damages are not favored in the law, because a plaintiff can be fully compensated for his injuries without receiving such damages.[17] Yet, as the foregoing discussion shows, even where punitive damages are concerned and *respondeat superior* therefore is not generally applicable, it has been recognized that an entity should

---

course, an employer may be held responsible under Title VII for the discriminatory conduct of a nonsupervisory employee, or even in some cases a non-employee, if the employer ratifies or condones the conduct. *See, e.g.*, 29 C.F.R. § 1604.11(d), (e); *DeGrace v. Rumsfeld*, *supra* note 14, 614 F.2d at 803; *Hall*, *supra*; *Hunter*, *supra*. *Cf. infra* notes 16 & 19.

[16] The principal may also be assessed punitive damages arising out of the act of a *non*-managerial agent if the principal or a managerial agent authorized, ratified or approved the act, or if the principal was reckless in employing the agent. *See* subsections (a), (b) and (d) of the foregoing Restatement sections. *Cf. supra* note 15; *infra* note 19.

[17] Indeed, punitive damages generally are not available at all in suits against governmental entities. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

be held liable for the wrongful conduct of those upon whose discretion the entity has chosen to rely.[18]

In sum, in a case such as this, where an act of the government is plainly involved and the requirements of § 1983 therefore are satisfied, a rule that holds the government responsible for the consequences of the discriminatory motivations of those upon whose discretionary judgments the government relies would best serve the purposes of the Equal Protection Clause and § 1981, and would comport with principles applied in analogous areas of the law.

2. In contrast, the "final policymaker" concept of *Praprotnik* would provide a wholly inappropriate vehicle to resolve this question.

It must be recalled that the *Praprotnik* test rests, in the end, on two points: the fact that § 1983 uses the words "subject or cause to be subjected," and the fact that the 1871 Congress refused to make governmental entities liable for the acts of private citizens engaged in a riot. *See supra* at 7-8. Whatever may be said of the strength of those points as support for the proposition that a governmental entity should not be held liable under § 1983 for a "constitutional tort" merely because it happens to employ a tortfeasor (*see supra* at 7-8 & note 4), neither the words of § 1983 nor the rejection of the Sherman Amendment plausibly can be viewed as constituting a congressional determination that the Equal Protection Clause or § 1981 should leave governments free to effectuate employment decisions that are based on

[18] We do not suggest that there is a close analogy between liability of an entity for punitive damages at common law and liability of an entity for *compensatory* damages under § 1981 and the Equal Protection Clause. Because punitive damages are generally disfavored, one would expect that the standard for awarding compensatory damages against an entity under § 1981 and the Equal Protection Clause would be substantially less strict than the standard for awarding punitive damages at common law. Our point is that even in the latter context, there is no notion that an entity should be held responsible only for the acts of "final policymakers."

the racially discriminatory motivations of important government officers, merely because the particular officers involved do not have "final policymaking authority."

The purposes of both the Equal Protection Clause and § 1981 would be far better served by the approach we have advocated than by application of the *Praprotnik* concept of "final policymaking authority."

IV. Applying this approach, in the present case it is clear that the decisionmaking process of the Dallas Independent School District was structured such that the discretionary judgment of Principal Todd was given controlling force in determining whether the School District would remove Jett from his position. This reflects the fact that Todd, even if he was not a "final policymaker," plainly held a supervisory, indeed, a managerial, position. Accordingly, whether or not Superintendent Wright or others had reason to suspect Todd's motives,[19] those motives should be imputed to the School District, and the District Court's finding of School District liability should be reinstated.

[19] Jett alleged that Wright did have reason to be concerned that Todd's statements might be racially motivated. Under the approach outlined in this brief, there is no need to address in this case any of the numerous questions that may arise when the plaintiff's theory of liability in a § 1983 case turns on allegations that one officer failed to train, supervise or correct the actions of a subordinate officer. *Cf. supra* notes 15 and 16; *City of Canton v. Harris*, No. 86-1088 (pending).

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be reversed and the case should be remanded with instructions that the judgment against the School District on Jett's race discrimination claims be reinstated.

Respectfully submitted,

MICHAEL H. GOTTESMAN
JEREMIAH A. COLLINS *
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record

FILED
FEB 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-2084, 88-214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NORMAN JETT,
Petitioner and Cross-Respondent,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT,
Respondent and Cross-Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT AND CROSS-PETITIONER

DONALD B. AYER
GLEN D. NAGER
ROBERT D. SWEENEY, JR.
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939
Of Counsel

BENNA RUTH SOLOMON *
JOYCE HOLMES BENJAMIN
BEATE BLOCH
STATE AND LOCAL LEGAL CENTER
Suite 349
444 N. Capitol Street, N.W.
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for* Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether a municipal employer may be held liable under 42 U.S.C. § 1981 based solely on racially discriminatory actions of a supervisor that are not attributable to an official policy or custom.

2. Whether an official policy or custom sufficient to impose liability on a municipal employer under 42 U.S.C. § 1981 and 42 U.S.C. § 1983 exists where state law vests final policymaking authority in persons other than the individuals who are alleged to have committed or approved the racially discriminatory acts in question.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	2
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. A MUNICIPALITY SHOULD NOT BE HELD LIABLE UNDER 42 U.S.C. § 1981 FOR RACIALLY DISCRIMINATORY ACTIONS OF EMPLOYEES THAT ARE NOT ATTRIBUTABLE TO AN OFFICIAL POLICY OR CUSTOM	9
A. The Language Of Section 1981 Evinces No Intent To Create *Respondeat Superior* Liability For Municipalities	10
B. The Legislative History Confirms That Congress Did Not Intend To Impose Liability On Municipal Employers Based On The Theory Of *Respondeat Superior*	11
C. Jett And His *Amici* Offer No Sound Reason For Allowing Municipal Liability Under Section 1981 On A *Respondeat Superior* Theory	18
II. A POLICY OR CUSTOM SUFFICIENT TO IMPOSE LIABILITY ON A MUNICIPALITY UNDER SECTIONS 1981 AND 1983 DOES NOT EXIST WHERE, AS HERE, STATE LAW VESTS FINAL POLICYMAKING AUTHORITY IN PERSONS OTHER THAN THOSE WHO COMMITTED OR APPROVED THE DISCRIMINATORY ACTS IN QUESTION	26
CONCLUSION	29

TABLE OF AUTHORITIES

CASES: Page

Allen v. McCurry, 449 U.S. 90 (1980) 13
Burnett v. Grattan, 468 U.S. 42 (1984) 18
City of Canton v. Harris, No. 86-1088 2
City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 16, 21, 22
City of Springfield v. Kibbe, 107 S. Ct. 1114 (1987) 2
City of St. Louis v. Praprotnik, 108 S. Ct. 915 (1988) ..... *passim*
Collector v. Day, 78 U.S. (11 Wall.) 113 (1871) 17
DeShaney v. Winnebago County Dep't of Social Services, No. 87-154 2
District of Columbia v. Carter, 409 U.S. 418 (1973) 15, 16
Ex parte Virginia, 100 U.S. 339 (1880) 17
Examining Board of Engineers, Architects & Surveyors v. Flores de Otero, 426 U.S. 572 (1976) 15
Farwell v. Boston & Worcester R.R., 4 Metc. 49 (Mass. 1842) 22
Fox v. The Northern Liberties, 3 Watts & Serg. 103 (Pa. 1841) 22
General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) ..... *passim*
Goodman v. Lukens Steel Co., 107 S. Ct. 2617 (1987) 11, 19, 23
Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939) 17
Hague v. CIO, 307 U.S. 476 (1939) 15
Hanna v. Home Insurance Co., 281 F.2d 298 (5th Cir.), *cert. denied*, 365 U.S. 838 (1960) 19
Hinojosa v. State, 648 S.W.2d 380 (Tex. Ct. App. 1983) 28
Hirych v. State, 136 N.W.2d 910 (Mich. 1965) 19
Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) 11
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) .. 19
Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861) 17

TABLE OF AUTHORITIES—Continued

Page

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 14, 15, 16, 18
Mahone v. Waddle, 564 F.2d 1018 (3d Cir. 1977) 13, 15
Mali v. Lord, 39 N.Y. 381 (1868) 22
McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) 10
Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) 10
Mitchum v. Foster, 407 U.S. 225 (1972) 13, 14, 15, 16
Mizell v. North Broward Hospital District, 427 F.2d 468 (5th Cir. 1970) 19
Monell v. Department of Social Services, 436 U.S. 658 (1978) ..... *passim*
Moor v. County of Alameda, 411 U.S. 693 (1973) .. 13, 24
NLRB v. Catholic Bishop, 440 U.S. 490 (1979) 23
Patterson v. McLean Credit Union, No. 87-107 (reargued October 12, 1988) 10
Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) 5, 16-17, 17, 20
Pena v. Rio Grande City Consolidated Independent School District, 616 S.W.2d 658 (Tex. Civ. App. 1981) 28
Prather v. City of Lexington, 52 Ky. (13 B. Mon.) 559 (1852) 22
Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) 17
Puerto Rico v. Branstad, 107 S. Ct. 2802 (1987) 17
Runyon v. McCrary, 427 U.S. 160 (1976) 12, 19
Saint Francis College v. Al-Khazraji, 107 S. Ct. 2022 (1987) 11
Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir.), *cert. denied*, 401 U.S. 948 (1970) 19
Screws v. United States, 325 U.S. 91 (1945) 12
Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) 11, 19
United States v. Classic, 313 U.S. 299 (1941) 12
Watson v. Devlin, 167 F. Supp. 638 (D. Mich. 1958), *aff'd*, 268 F.2d 211 (6th Cir. 1959) 19

TABLE OF AUTHORITIES—Continued

	Page
Wilson v. Abilene Independent School District, 190 S.W.2d 406 (Tex. Civ. App. 1945)	28
Wilson v. Garcia, 471 U.S. 261 (1985)	18
Zwickler v. Koota, 389 U.S. 241 (1967)	15
CONSTITUTIONAL PROVISIONS:	
U.S. Constitution	
Amend. XIII	23
Amend. XIV	23
STATUTES:	
Federal:	
18 U.S.C. § 242	12
28 U.S.C. § 1331	16
28 U.S.C. § 1343(a)(3)	*passim*
42 U.S.C. § 1981	*passim*
42 U.S.C. § 1982	11, 19
42 U.S.C. § 1983	*passim*
42 U.S.C. § 1988	13, 24
Title VII of the Civil Rights Act of 1964	10, 25
42 U.S.C. § 2000e(b)	10
Civil Rights Act of 1866 (14 Stat. 27)	5, 11, 12
Section 1	*passim*
Section 2	12, 14, 19
Section 3	12, 13, 15
Sections 4-8	13
Section 9	13
Section 10	13
Enforcement Act of 1870	12
Ku Klux Klan Act of 1871	*passim*
Section 1	16, 18
State:	
Tex. Code Ann., Education § 23.26(b) (Vernon 1987)	27-28

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS:	Page
Cong. Globe, 39th Cong., 1st Sess. (1866)	
page 474	12
page 475	12
page 479	13
page 1271-1272	14
page 1272	14
page 1290-1291	14
page 1292-1293	23
page 1295	14
page 1680	13
page 1759	13
Cong. Globe, 42d Cong., 1st Sess. 568 (1871)	16
Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871)	16
MISCELLANEOUS:	
L. David, *Municipal Liability for Tortious Acts and Omissions* (1936)	21
Fuller & Casner, *Municipal Tort Liability In Operation*, 54 Harv. L. Rev. 437 (1941)	21
F. Harper & F. James, *The Law of Torts* (1956)	21-22
2 F. Hilliard, *The Law of Torts* (4th ed. 1874)	22, 23
W. Paley, *Law of Principal and Agent* (4th American ed. 1884)	22-23
W. Seavey, *Agency* (1964)	22
J. Story, *Agency* (Boston, 6th ed. 1863)	22
51 Tex. Jur. 2d, *Schools* (1970)	28
W. Williams, *Municipal Liability for Tort* (1901)	21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-2084 and 88-214

NORMAN JETT,
Petitioner and
Cross-Respondent,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT,
Respondent and
Cross-Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT AND CROSS-PETITIONER

INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. They must bear the finan-

cial and management burdens that arise from legal rules holding public employers responsible for the actions of their employees. For this reason, the *amici* have filed a number of briefs with this Court in cases raising issues of municipal liability. *See, e.g., City of Canton v. Harris*, No. 86-1088; *DeShaney v. Winnebago County Dep't of Social Services*, No. 87-154; *City of St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988); *City of Springfield v. Kibbe*, 107 S. Ct. 1114 (1987).

This case presents important questions concerning potential municipal liability for constitutional violations by non-policymaking municipal employees. *Amici*'s principal concern is with petitioner's argument that the liability of a municipality under 42 U.S.C. § 1981 is not restricted, as it is under 42 U.S.C. § 1983, to actions that are those of the municipality itself, but may be imposed on a theory of *respondeat superior*. Such an extension of "no-fault" liability to municipalities would nullify, in substantial part, this Court's careful crafting of the standards for municipal liability under Section 1983.

Amici also have a continuing concern about the evolving standards for municipal liability under Section 1983. In *amici*'s view, the only appropriate standard for municipal liability under Section 1983 as well as under Section 1981 is the existence of an unconstitutional policy or custom on the part of the municipality itself. Because this Court's resolution of these questions will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.*

STATEMENT

1. Petitioner and cross-respondent, Norman Jett, who is white, is a former teacher, head football coach, and athletic director of South Oak Cliff High School, a predominantly black high school in Dallas, Texas (Pet. App. in No. 87-2084, at 2A). In March 1983, his former principal, Frederick Todd, who is black, recommended that Jett be relieved of his responsibilities as head football coach and athletic director at South Oak Cliff (*id.* at 2A-3A). Jett subsequently met with supervisory officials of respondent and cross-petitioner, the Dallas Independent School District (DISD), including Linus Wright, Superintendent of the DISD, to discuss Todd's recommendation (Pet. App. in No. 87-2084, at 3A). Jett informed Wright that he believed Todd's recommendation was unfounded and that Todd wanted a black coach (*id.* at 3A-4A). Wright, however, determined that he should "go with the principal" and that Jett should be removed from his position at South Oak Cliff (*id.* at 4A).

Jett was then assigned to teach at the DISD's Business Magnet School, without any coaching responsibilities (Pet. App. in No. 87-2084, at 4A). A few months later, he was reassigned to Jefferson High School as a history teacher and freshman football and track coach (*id.* at 4A-5A). Shortly thereafter, he resigned from the DISD (*id.* at 5A).

2. Prior to being reassigned to Jefferson High School and resigning his employment, Jett filed this action under 42 U.S.C. §§ 1981 and 1983 against the DISD, Todd, and the DISD Board of Trustees (Pet. App. in No. 87-2084, at 5A). A jury determined that Jett had been deprived of his position as athletic director and head football coach at South Oak Cliff because of his race and his exercise of protected speech, and in violation of his right to procedural due process (*id.*). The district court entered a judgment for $450,000 in damages and $112,870.45 in attorney's fees for Jett (as to which Todd was held jointly and severally liable for all of the attorney's fees and $50,000 in damages) (*id.*). In doing so, the court found that, by delegating unreviewable authority to Wright to "reassign" personnel as he saw fit, the DISD's Board

---

* The parties' letters of consent, pursuant to Rule 36 of the Rules of the Court, have been filed with the Clerk.

of Trustees had given official sanction to the employment decisions that Jett was challenging, and that a municipality may be liable for race discrimination under Section 1981 on a theory of *respondeat superior* (*id.* at 46A-47A).

3. The Fifth Circuit reversed and remanded (Pet. App. in No. 87-2084, at 1A-32A). It determined that Jett had no claim against either Todd or the DISD for a violation of due process (*id.* at 6A-10A). Moreover, although the court sustained the jury's finding that Todd had discriminated against Jett on the basis of race and his exercise of protected speech, it determined that a new trial was necessary on the damages award against Todd (*id.* at 13A-20A, 31A). Finally, it reversed the findings of liability and damages against the DISD, and remanded these matters for another trial (*id.* at 20A-31A).

As to the claim against the DISD under 42 U.S.C. § 1983, the court noted that "liability may be imposed [under Section 1983] if the constitutional violation is due to official action, policy, or custom" (Pet. App. in No. 87-2084, at 20A). It found the district court's instruction to the jury in this regard deficient "because it did not state that the city could be bound by the principal or superintendent only if he was delegated policymaking authority" (*id.* at 21A). In so concluding, the court questioned, but did not reject, the district court's judgment that Wright had the requisite policymaking authority because the DISD's Board of Trustees had delegated to him unreviewable authority to reassign members of the coaching staff (*id.* at 21A-23A). Rather, it rejected only the district court's judgment that the DISD could be held liable without any "finding that Wright's decision was in fact improperly motivated or that Wright knew or believed that (or was consciously indifferent to whether) Todd's recommendation was so motivated" (*id.* at 25A).

As to the claim against the DISD under 42 U.S.C. § 1981, the court concluded "that to impose municipal liability on a *respondeat superior* theory . . . would be inconsistent with" *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (Pet. App. in No. 87-2084, at 28A). The court concluded that "[t]o impose such vicarious liability for only certain wrongs based on section 1981 apparently would contravene the congressional intent behind section 1983," as articulated by this Court (*id.* at 29A). On rehearing, the court further explained, but did not change, its decision on the Section 1981 issue (Pet. App. in No. 87-2084, at 34A-44A).

SUMMARY OF ARGUMENT

I. A municipal employer should not be held liable under 42 U.S.C. § 1981 upon a theory of *respondeat superior*. The language of Section 1981 does not purport to create a civil cause of action, much less to impose this sort of vicarious liability on a municipal employer. Moreover, the legislative history shows that, when Congress enacted the forerunner to Section 1981 in Section 1 of the Civil Rights Act of 1866, it expressly declined to adopt a federal civil remedy. Rather, consistent with a century of tradition and practice, it left the task of civil enforcement to the state courts, and directed the federal government to enforce Section 1 through criminal sanctions and the use of the military.

Five years later, in the Ku Klux Klan Act of 1871, Congress enacted the forerunners of 42 U.S.C. § 1983 and 28 U.S.C. § 1343(a)(3), which created a civil cause of action for the enforcement of Section 1981 and original jurisdiction in the federal courts over such actions. But, in doing so, Congress rejected, on constitutional grounds, the imposition of *respondeat superior* liability on municipalities. Interpreting Section 1981 as impliedly

allowing *respondeat superior* suits against municipalities would conflict with this express congressional judgment.

Honoring the judgment of the 1871 Congress does not constitute a repeal of a pre-existing civil remedy. An express civil cause of action for the enforcement of rights protected by Section 1981 did not exist until Section 1983 was enacted in 1871. Moreover, an implied civil cause of action for the enforcement of Section 1981 was not recognized until the early 1970s, subsequent to, and as a consequence of, this Court's holding that Section 1981 applies to the actions of private persons. Even then, the Court based this implied cause of action on congressional acts and jurisdictional statutes that postdate the 1866 Act. Thus, rejection of *respondeat superior* liability in Section 1981 cases involving municipalities—based on the intent of the 1871 Congress—does not constitute a repeal or narrowing of a pre-existing remedy.

Contemporaneous common law rules of *respondeat superior* cannot be interposed to frustrate congressional intent to limit municipal liability. Section 1983 constitutes an express congressional mandate against imposition of *respondeat superior* liability on municipalities. Moreover, the suggestion that the common law imposed such liability on municipalities is by no means representative of all the contemporary authorities. Furthermore, contemporaneous common law doctrine did not permit imposition of vicarious liability for intentional torts, the closest analogue to Section 1981 violations. Finally, Congress's constitutional concerns about vicarious liability for violation of federally imposed duties renders unpersuasive any analogy to municipal *respondeat superior* liability at common law.

Nor is municipal *respondeat superior* liability necessary to promote the policies underlying Section 1981. Section 1981 prohibits only intentional race discrimination, and a custom or policy limitation is thus implicitly

a necessary (albeit not sufficient) condition for imposition of Section 1981 liability. Moreover, ample remedies are available to enforce Section 1981 without *respondeat superior* liability—including civil damages, injunctive relief, punitive damages, and criminal penalties against all actors who can fairly be said intentionally to discriminate.

II. To implement congressional intent that liability be imposed only for a municipality's own acts, the Court should assess municipal liability under both Sections 1981 and 1983 by the definition of municipal policy or custom set forth in the plurality opinion in *City of St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988). Thus, a municipality should be liable only when it "officially sanctioned or ordered" the statutory violation complained of, that is, when a municipal employee has acted pursuant to a policy promulgated by those with "final policymaking authority," as determined by state law (*id.* at 924).

Applying the *Praprotnik* test here, the case against the DISD must be dismissed. All policymaking authority is vested by state law in the DISD's Board of Trustees; the Superintendent of Schools has no such authority. Thus, even if Superintendent Wright knew or approved of Principal Todd's actions, liability could not be imposed on the DISD. There is no suggestion that the DISD's Board of Trustees knew of and approved Principal Todd's actions, and it was entitled to presume that Superintendent Wright exercised the discretion delegated to him in a lawful manner.

ARGUMENT

In *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), this Court held that a municipal employer may not be held liable under 42 U.S.C. § 1983 on a theory of *respondeat superior*—that is "for an injury inflicted solely by its employees or agents." The Court reasoned that Section 1983, as originally enacted, imposed liability only if a person "subject[ed], or caused to be subjected," another person to the deprivation of a federally protected right. The Court understood that language to mean that, in the case of one who did not directly inflict the injury, liability was appropriate only where one could be said to have "caused" it to be committed (436 U.S. at 692).

The Court found substantial support for this conclusion in the legislative history of Section 1983. It reasoned (a) that Congress in 1871 rejected the "Sherman Amendment," which would have imposed vicarious liability on municipalities for injuries caused by "any persons riotously and tumultuously assembled" within their borders (436 U.S. at 666), on the ground that the amendment was of questionab'e constitutional validity as an invasion of state and local governmental prerogatives; and (b) that the same constitutional difficulties would have applied to liability based on a theory of *respondeat superior* (*id.* at 692-694). The Court held that only the "execution of [the] government's policy or custom" may subject a municipality to liability under Section 1983 (*id.* at 694). That limitation subjects a municipality to liability only where the act in question is committed by those with "final policymaking authority" in the relevant area of the municipality's business.

The same "policy or custom" limitation on municipal liability which the *Monell* Court found embodied in Section 1983 should be applied as well in actions initiated under 42 U.S.C. § 1981. In this case, it is clear that no

final policymaker under state law committed or approved the discriminatory acts in question.

I. A MUNICIPALITY SHOULD NOT BE HELD LIABLE UNDER 42 U.S.C. § 1981 FOR RACIALLY DISCRIMINATORY ACTIONS OF EMPLOYEES THAT ARE NOT ATTRIBUTABLE TO AN OFFICIAL POLICY OR CUSTOM.

Whether a municipality may be deemed to have violated 42 U.S.C. § 1981 solely because certain discriminatory actions were taken by its employees is, of course, a question of congressional intent. The language and legislative history of Section 1981 suggest that Congress did not intend to impose liability on municipalities based on such a theory of *respondeat superior*. Indeed, the 1866 Congress, which enacted the statute from which Section 1981 derives, provided for no federal cause of action at all. When Congress, in the 1871 statute from which Section 1983 derives, expressly provided a damages cause of action against governments for violation of Section 1981 rights, it did not provide for *respondeat superior* liability, but rather limited liability to cases involving a governmental policy or custom. In fashioning the judicially created liability rules under Section 1981, this Court should follow the judgments made by Congress when it addressed the questions in Section 1983 and should therefore adopt Section 1983's limits on governmental liability in the Section 1981 context.[1]

---

[1] The situation with respect to private employers is different, as Congress did not speak to that situation in Section 1983. Judicial fashioning of liability rules under Section 1981 for private employers is therefore not necessarily constrained by Congress's specific judgment on the issue in Section 1983. Contrary to the assertion of *amicus* NAACP/ACLU (at 15-18), however, this Court has not decided whether *respondeat superior* liability exists under Section 1981 against private employers. *See General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 392-395 (1982) (assuming without deciding question). Given the controversy surrounding whether Section 1981 was intended to apply to the actions of pri-

A. The Language Of Section 1981 Evinces No Intent To Create *Respondeat Superior* Liability For Municipalities.

Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

This language is declarative of a "right" of all persons to be free of racial discrimination in the making and enforcement of contracts and in "laws and proceedings for the security of persons and property." *See McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 285-296 (1976). The language does not itself speak in terms of liability for impairing such rights, nor of a civil cause of action—or indeed of any other mechanism—for enforcement of those rights. And it certainly makes no mention of a theory of *respondeat superior* liability applicable in any such civil action. This omission is significant because, as Title VII of the Civil Rights Act of 1964 illustrates (42 U.S.C. § 2000e(b) ("Employer" defined to include "any agent")), Congress is capable of creating a civil cause of action in which an employer—including a municipal employer—may be held vicariously liable for the racially discriminatory actions of its employees. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 69-73 (1986). Thus, although the language of the statute is not conclusive, the absence of any language that can easily be construed to create *respondeat superior* liability does suggest an absence of intention to

---

vate persons at all (*see Patterson v. McLean Credit Union*, No. 87-107) (reargued Oct. 12, 1988), we suggest that the private employer inquiry be left for another day.

impose such liability. *See Monell v. Department of Social Services*, 436 U.S. at 692-693 n.57.

B. The Legislative History Confirms That Congress Did Not Intend To Impose Liability On Municipal Employers Based On The Theory Of *Respondeat Superior*.

This Court has recognized that the post-Civil War civil rights acts "were all products of the same milieu and were directed against the same evils." *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982). Thus, in defining the contours of the implied cause of action under Section 1981 (*Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-460 (1975); *cf. Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238-240 (1969) (recognizing existence of implied private right of action under 42 U.S.C. § 1982)), the Court has repeatedly looked not only to the language and legislative history of Section 1981 as originally enacted in 1866, but also to the language and legislative history of the subsequent statutes that have amended, modified, and reinforced Section 1981 and the civil rights enforcement scheme of which it is an integral part. *See, e.g., General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. at 382-391; *Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2026-2028 (1987); *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2621 (1987). When Section 1981 is considered in this context, it is clear that municipal liability resting on a theory of *respondeat superior* is contrary to the intent of Congress.

1. This Court has held that Section 1981 originated in Section 1 of the Civil Rights Act of 1866, 14 Stat. 27.[2]

---

[2] That Section provided:

> Be it enacted . . . That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except

Runyon v. McCrary, 427 U.S. 160, 167-171 & n.8 (1976).[3] Significantly, proponents of this section described it as a declaration of rights to be enforced by machinery set up in the remaining sections of the statute. For example, Senator Trumbull, the principal sponsor of the bill, said (Cong. Globe, 39th Cong., 1st Sess. 474 (1866)): "This section is the basis of the whole bill. The other provisions of the bill contain the necessary machinery to give effect to what are declared to be the rights of all persons in the first section . . . ." *See also id.* at 475 (remarks of Sen. Trumbull) ("A law is good for nothing without a penalty, without a sanction to it, and that is to be found in the other sections of the bill.").

Section 2 of the Act made it a crime for anyone acting under color of law to "subject, or cause to be subjected," another person to a deprivation of the rights established in Section 1 of the Act.[4] Section 3 of the Act conferred jurisdiction upon the federal courts to entertain criminal actions initiated under Section 2; and provided that persons claiming rights under Section 1 of the Act could

---

as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

[3] Justice White has concluded that Section 1981 is more properly traced to the Enforcement Act of 1870 than to the Civil Rights Act of 1866. *See Runyon v. McCrary*, 427 U.S. at 195-211 (White, J., dissenting). Nothing about the language or history of the 1870 legislation suggests a purpose at that time to create a remedy against municipalities based on a theory of *respondeat superior*.

[4] The criminal remedy created in Section 2 of the Act is the forerunner of 18 U.S.C. § 242. *See Screws v. United States*, 325 U.S. 91 (1945); *United States v. Classic*, 313 U.S. 299 (1941).

remove to federal court certain civil and criminal proceedings brought against them in state courts.[5] Sections 4 through 8 set the ground rules for the apprehension and prosecution of persons violating Section 1 of the Act. Section 9 empowered the President "to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and to enforce the due execution of this act." And Section 10, the final section, authorized an appeal to this Court in "any cause under the provisions of this act."

Noticeably absent from this enforcement machinery was any civil cause of action or original federal civil jurisdiction for the private enforcement of Section 1 of the Act.[6] This omission was not an oversight by Con-

---

[5] Section 3 of the Act also contained the forerunner of the present 42 U.S.C. § 1988. *See Moor v. County of Alameda*, 411 U.S. 693, 704-705 (1973).

[6] Some opinions have erroneously suggested that Section 3 of the 1866 Act created a civil cause of action and original federal civil jurisdiction for the enforcement of Section 1 of the Act. *See, e.g., Mahone v. Waddle*, 564 F.2d 1018, 1032-1033 (3d Cir. 1977). While the language of Section 3 did purport to confer jurisdiction on the federal courts over *some* civil causes of action (*cf. Moor v. County of Alameda*, 411 U.S. at 704-705), it did not itself purport to create any civil causes of action or to authorize assumption of original jurisdiction over any such civil actions. Rather, it conferred jurisdiction—*i.e.*, removal jurisdiction—only over civil causes which had already been initiated in state court. The brief legislative history of Section 3 directly supports this view. *See* Cong. Globe, 39th Cong., 1st Sess. 479, 1680, 1759. Moreover, any broader grant of jurisdiction would surely have provoked an intense debate, yet there was none—in sharp contrast to the lengthy debate in 1871 when Congress enacted the forerunners of 42 U.S.C. § 1983 and 28 U.S.C. § 1343(a)(3). *See Mitchum v. Foster*, 407 U.S. 225, 238-241 (1972). That no such debate occurred is a telling indication that Congress was not conferring original civil jurisdiction or creating a civil cause of action. *See Mahone v. Waddle*, 564 F.2d at 1039, 1044-1048 (Garth, J., dissenting); *Allen v. McCurry*, 449 U.S. 90, 99 n.14 (1980) (Section 3 embodies remedy of "postjudgment removal for state court defendants whose civil rights were threatened").

gress. Representative Bingham of Ohio in fact proposed that a civil remedy be placed in the statute in lieu of the criminal provision in Section 2. *See* Cong. Globe, 39th Cong., 1st Sess. 1271-1272, 1290-1291. But Bingham's proposal was defeated by a vote of 53 to 45 (*id.* at 1272), on the grounds that it was the obligation of the Government to enforce the rights created in Section 1 and that private citizens should not have to seek their own remedies at their own cost. *Id.* at 1295. No one suggested that this debate was moot because a federal civil remedy and original federal civil jurisdiction had already been created elsewhere in the Act. Rather, the debate appears to have contemplated either a criminal *or* civil remedy, but not both.

Congress decided upon the former.[7] Thus, the language of the statute, its structure, and the legislative history all indicate that, as originally enacted, Section 1981 did not include a private cause of action at all, much less a cause of action against municipal employers based on *respondeat superior* liability.

2. Five years later, in the Ku Klux Klan Act of 1871, Congress revisited the civil cause of action question. At that time, after extensive debate, Congress provided the basis for, and the limitations on, an original civil cause of action in federal court for violations of, among other things, Section 1981. It enacted the civil cause of action

[7] The criminal provision in Section 2 seems explicitly to have rejected the concept of *respondeat superior* liability. This Court has repeatedly held that the "subject[ed], or cause[d] to be subjected," language in Section 1983—which was at issue in *Monell*—derives from Section 2 of the 1866 Act. *See, e.g., Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543-544 n.7 (1972); *Mitchum v. Foster*, 407 U.S. at 238. In *Monell*, the Court ruled that the use of the "subject[ed], or cause[d] to be subjected," language indicates a rejection of the theory of *respondeat superior* liability. *See Monell v. Department of Social Servs.*, 436 U.S. at 691-692.

now embodied in 42 U.S.C. § 1983,[8] and the grant of federal civil jurisdiction now embodied in 28 U.S.C. § 1343(a)(3).[9]

a. "During most of the Nation's first century, Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws." *Zwickler v. Koota*, 389 U.S. 241, 245 (1967). In 1871, however, Congress determined that "this reliance had been misplaced." *District of Columbia v. Carter*, 409 U.S. 418, 428 (1973). It found that the state courts had not been effectively exercising their common law powers to redress violations of federally secured constitutional and statutory rights. *See Mitchum v. Foster*, 407 U.S. 225, 240-242 (1972). It therefore enacted Section 1983,

[8] Section 1983 provides, in pertinent part, that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[9] Section 1343(a)(3) provides that "[t]he district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . [t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . ."

It has been suggested that this grant of federal civil jurisdiction originated in Section 3 of the 1866 Act, rather than in the 1871 Act. *See Mahone v. Waddle*, 564 F.2d at 1033; *see also Hague v. CIO*, 307 U.S. 476, 508 n.10 (1939) (opinion of Roberts, J.). But this suggestion collapses under the weight of contrary authority from this Court. *See Examining Board of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 581, 583-584 (1976); *Lynch v. Household Fin. Corp.*, 405 U.S. at 543-544 n.7; *see also Zwickler v. Koota*, 389 U.S. 241, 247 (1967); *District of Columbia v. Carter*, 409 U.S. 418, 428 n.22 (1973); note 6, *supra*.

to "open[] the federal courts to private citizens, offering a uniquely federal remedy" (*id.* at 239), and 28 U.S.C. § 1343(a)(3), to create "original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials" (*District of Columbia v. Carter*, 409 U.S. at 428).[10]

b. In creating this federal civil cause of action and jurisdiction, Congress recognized that, among other things, it was adding to the arsenal of weapons available to enforce the rights created by Section 1 of the 1866 Act. Thus, in proposing Section 1 of the 1871 Act, Representative Shellabarger stated (Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871)) that "[t]he model for [this section] will be found in the second section of the act of April 9, 1866, known as the 'civil rights act.' That section provides a criminal proceeding in identically the same case as this one provides a civil remedy . . . ." Similarly, Senator Edmunds stated (Cong. Globe, 42d Cong., 1st Sess. 568 (1871)) that, in his view, there could be no valid objection to the remedial and jurisdictional provisions set forth in Section 1 of the 1871 Act because "it is merely carrying out the principles of the civil rights bill [of 1866], which have since become part of the Constitution."

c. As the Court held in *Monell*, however, and has reiterated on several occasions, Congress did not, in creating this federal civil cause of action and jurisdiction, intend to impose *respondeat superior* liability on municipalities. *See Monell v. Department of Social Services*, 436 U.S. at 691-694; *see also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 817-820 (1985); *Pembaur v. City*

[10] In 1875, Congress enacted the forerunner of the general federal question jurisdiction provision in 28 U.S.C. § 1331 and thereby expanded even further the authority of federal courts to enforce federal rights. *See Lynch v. Household Fin. Corp.*, 405 U.S. at 548 & n.14.

of Cincinnati, 475 U.S. 469, 478-481 (1986). Rather, the Court has said that, "while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of *others*." *Pembaur v. City of Cincinnati*, 475 U.S. at 479 (emphasis in original). Thus, the Court has concluded that, because "creation of a federal law of *respondeat superior* would have raised all of the[se] constitutional problems" as well,[11] Congress chose not to incorporate such a doctrine into Section 1983. *Monell*, 436 U.S. at 693.

3. The historical context thus makes clear that municipalities cannot be found liable under Section 1981 on a *respondeat superior* theory. When Congress enacted the forerunner to Section 1981 in Section 1 of the 1866 Act, it expressly declined to adopt a federal civil remedy for violations of the rights secured therein. Rather, consistent with a century of tradition and practice, it left the task of civil enforcement to the state courts and directed the federal government to enforce Section 1 through criminal sanctions and the use of the military. In 1871, Congress vested the federal courts with authority to entertain private civil actions to enforce rights secured by Section 1981, among other provisions. But, in doing so, Congress

[11] These constitutional concerns arose from the then-reigning "dual sovereignty" doctrine. *See Monell v. Department of Social Servs.*, 436 U.S. at 671-674. Under that doctrine, it was unconstitutional for the federal government to impose federal duties—such as a duty to enforce the fugitive slave clause, or a duty to pay a federal tax—on the States or their instrumentalities. *See Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861) (overruled in *Puerto Rico v. Branstad*, 107 S. Ct. 2802, 2809-2810 (1987)); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). The "dual sovereignty" doctrine has since been recast by this Court. *See Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939) (overruling *Collector v. Day*); *Ex parte Virginia*, 100 U.S. 339 (1880).

rejected, on constitutional grounds, the imposition of *respondeat superior* liability on municipalities. Thus, Section 1981 cannot properly be read as impliedly allowing *respondeat superior* suits against municipalities. To do so would conflict with the contrary judgment that Congress made in 1871 in enacting the forerunners to Section 1983 and 28 U.S.C. § 1343(a)(3), which are the express civil enforcement provisions for Section 1981.

C. Jett And His *Amici* Offer No Sound Reason For Allowing Municipal Liability Under Section 1981 On A *Respondeat Superior* Theory.

Jett and his *amici* offer a series of arguments concerning why municipalities must be held liable under Section 1981 based on a theory of *respondeat superior*. None of these arguments is convincing.

1. Jett first argues (Br. 15-21) that there is no evidence in the language or legislative history of the 1871 Act that Congress intended thereby to narrow the civil cause of action included in the 1866 Act.[12] As ex-

[12] In part, Jett relies (Br. 18-21) on the contention that no such intent is possible, since Congress intended Sections 1981 and 1983 to deal with entirely distinct classes of rights. This argument is based on a discredited legal theory—distinguishing between "natural rights" and "political rights"—that Jett admits (Br. 19) has "not . . . survived," and that, as Senator Edmunds' above-quoted statement demonstrates, was not intended by the 1871 Congress. See *supra* page 16. Jett fails to cite any legislative history to support his claim that Congress did not intend Section 1 of the 1871 Act to subsume the rights articulated in Section 1 of the 1866 Act.

As this Court stated in *Lynch v. Household Finance Corp.*, 405 U.S. at 545, "[t]he broad concept of civil rights embodied in the 1866 Act and in the Fourteenth Amendment is unmistakably evident in the legislative history of § 1 of the Civil Rights Act of 1871." More recent decisions of this Court have given effect to this intent. *See, e.g., Wilson v. Garcia*, 471 U.S. 261, 273 (1985) (Section 1983 actions may be brought based on "discrimination in public employment on the basis of race"); *Burnett v. Grattan*, 468 U.S. 42, 43-47 (1984) (claim of race discrimination in public employment brought under Sections 1981 and 1983).

plained above, however, no express civil cause of action for enforcement of the rights protected by Section 1981 (and Section 1982) was created until 1871, when the forerunners of the present Section 1983 and 28 U.S.C. § 1343(a)(3) were enacted. And no implied civil cause of action for the enforcement of the rights protected by Section 1981 (and Section 1982) was recognized until this Court and some lower federal courts held, in the late 1960s and early 1970s, that these statutes applied to the discriminatory actions of private persons. *Compare Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir.) (cause of action), *cert. denied*, 401 U.S. 948 (1970); *Mizell v. North Broward Hospital District*, 427 F.2d 468 (5th Cir. 1970) (cause of action), *with Hanna v. Home Insurance Co.*, 281 F.2d 298, 303 (5th Cir.) (no cause of action), *cert. denied*, 365 U.S. 838 (1960); *Watson v. Devlin*, 167 F. Supp. 638 (D. Mich. 1958) (no cause of action), *aff'd*, 268 F.2d 211 (6th Cir. 1959); *Hirych v. State*, 136 N.W.2d 910, 912 n.1 (Mich. 1965) (no cause of action). In recognizing an implied cause of action at that time, the courts rested in part on congressional actions that post-date the creation in 1871 of an explicit civil cause of action for violations of Section 1981. *See, e.g., Goodman v. Lukens Steel Co.*, 107 S. Ct. at 2621; *Sullivan v. Little Hunting Park*, 396 U.S. at 238; *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 412 n.1, 414-415 nn.13 & 14. Thus, reliance on the intent of the 1871 Congress in concluding that municipal liability under Section 1981 cannot be predicated on a theory of *respondeat superior* does not in any way constitute a narrowing of a pre-existing cause of action, express or implied.

2. For similar reasons, Jett errs in suggesting (Br. 21-26) that the exclusion of the "subjects, or causes to be subjected," language from all but Section 2 of the 1866 Act indicates an intention to allow *respondeat su-*

perior liability of municipalities under Section 1 of that Act.[13] Such language limiting the class of potentially liable parties had no place, however, in a statute that, when enacted, created no civil liability of anyone. Its absence therefore cannot support an inference that the right of action implied later—based in part on subsequent congressional enactments—is one of unprecedented breadth. Rather, the limits of the action to be implied must be drawn from the intent of the various congressional actions—many of which post-dated 1866—that ultimately led the Court to recognize the implied right of action.[14]

3. Jett (Br. 26-27) and his *amici* (NAACP/ACLU Br. 10-46) next suggest that an intention to impose *respondeat superior* liability on municipalities should be inferred on the basis of contemporaneous common law rules of the 1860s that allegedly subjected municipalities to liability on that basis. This argument is fallacious for numerous reasons.

First, any such inference is, of course, reasonable only insofar as it is consistent with what is otherwise known

[13] Jett also suggests (Br. 13-14, 21-26) that the "color of law" language in the 1871 Act supports the "policy or custom" test and that the absence of this language in Section 1981 proves Congress did not intend a "policy or custom" limitation under that Section. As Jett concedes, however, the "color of law" language has been "given other meanings" by the Court (Br. 13). Moreover, the Court has never suggested that the "color of law" language is a source of the "policy or custom" limitation; indeed, *Monell* suggests just the contrary. *See Monell v. Department of Social Servs.*, 436 U.S. at 690-695.

[14] In any event, the "subjects, or causes to be subjected," language was not the sole basis of the *Monell* Court's rejection of the theory of *respondeat superior*. The Court was substantially motivated as well by the statute's legislative history, together with "the absence of any language in § 1983 which can easily be construed to create *respondeat superior* liability." *Monell v. Department of Social Servs.*, 436 U.S. at 693 n.57. *See also Pembaur v. City of Cincinnati*, 475 U.S. at 478-479.

of Congress's intentions from the relevant statutory language and legislative history. In this instance, the alleged common law rules are inconsistent with statutory language and legislative history. In enacting Section 1983 in 1871, Congress created an express civil enforcement provision for rights protected by what is now Section 1981. As this Court held in *Monell*, Congress intended the "subjects, or causes to be subjected," language of Section 1983 to bar imposition of liability on municipalities pursuant to a theory of *respondeat superior*. *Monell v. Department of Social Services*, 436 U.S. at 691-694. Thus, whatever the common law rules were in the 1860s concerning municipal *respondeat superior* liability, Congress plainly intended no such liability with regard to the rights guaranteed by Section 1981.

Second, the premise that, in 1866, municipal employers were generally liable at common law on a theory of *respondeat superior* "is by no means representative of all the contemporary authorities" (*City of Oklahoma City v. Tuttle*, 471 U.S. at 818-819 n.5 (opinion of Rehnquist, J.)).[15] While some courts at that time appear to have found municipalities liable based on the negligent acts of their agents, even that liability was confined by "certain rather complicated municipal tort immunities" (*id.* at 818-819 n.5). In particular, municipalities were considered immune from liability for "governmental" acts (such as providing education) as opposed to "proprietary" acts (including building and maintaining utilities, bridges, etc.). *See* W. Williams, *Municipal Liability for Tort* §§ 11, 17 (1901); 2 F.

[15] Indeed, there is authority suggesting that municipalities could never be held liable based on *respondeat superior*. *See* L. David, *Municipal Liability for Tortious Acts and Omissions* 101 (1936) ("The absence of the principle of respondeat superior is the most conspicuous factor in the entire law of tort liability of municipalities and their officers.") (quoted in Fuller & Casner, *Municipal Tort Liability In Operation*, 54 Harv. L. Rev. 437, 439 n.7 (1941)).

Harper & F. James, *The Law of Torts* §§ 29.6-29.10 (1956). Thus, Justice Story stated:

> [W]here persons are acting as public agents, they are responsible only for their own misfeasances and negligences, and . . . not for the misfeasances and negligence of those who are employed under them, if they have employed persons of suitable skill and ability, and have not co[illegible]perated in or authorized the wrong . . . .

J. Story, *Agency* § 321 (Boston, 6th ed. 1863); *see also id.* §§ 320-22, 457.[16]

Moreover, any general recognition of *respondeat superior* liability in the mid-nineteenth century was qualified in other respects as well. In particular, there is much authority indicating that, at the time Section 1981 was enacted, the theory of *respondeat superior* did not extend to intentional torts.[17] *See Fox v. The Northern Liberties*, 3 Watts & Serg. 103, 106 (Pa. 1841); *Prather v. City of Lexington*, 52 Ky. (13 B. Mon.) 559, 563 (1852); *Mali v. Lord*, 39 N.Y. 381, 383 (1868); W. Seavey, *Agency* § 89 at 155 (1964) (*respondeat superior* liability limited to negligence "until the second half of the nineteenth century"); W. Paley, *Law of Principal*

[16] In *Tuttle*, no other Justice joined, and four Justices expressly disagreed with, the dissenting opinion, which argued that *Monell*'s rejection of *respondeat superior* liability for municipalities should be abandoned. Justice Stevens alone believed that such liability could have been imposed under contemporaneous common law principles. *See* 471 U.S. at 834-842 (Stevens, J., dissenting).

[17] Also, under the "fellow servant" rule applied during these times, the *respondeat superior* liability of any employer did not extend to the tortious acts of one employee against a fellow employee. *Farwell v. Boston & Worcester R.R.*, 4 Metc. 49 (Mass. 1842). *See also* 2 F. Hilliard, *The Law of Torts* 463 (4th ed. 1874); *see generally* J. Story, *supra*, §§ 453d, 453e. Because the allegedly discriminatory action here was taken by a fellow employee, albeit a supervisor, it is at least arguable that the employer's liability would have been denied at common law on that ground as well.

and Agent *295, *299 (4th American ed. 1884); 2 F. Hilliard, *The Law of Torts* 407-408 (4th ed. 1874). This Court has held that a violation of Section 1981 is most properly characterized as an intentional tort. *See Goodman v. Lukens Steel Co.*, 107 S. Ct. at 2621; *see also General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. at 383-391 (Section 1981 applies only to intentional race discrimination). Thus, the present case of alleged intentional discrimination would seemingly not have given rise to *respondeat superior* liability, even against an employer who was not a municipality.[18]

Finally, even assuming *arguendo* that contemporary tort rules would have imposed *respondeat superior* liability on a municipal employer for the intentionally tortious acts of its employees, it would still be unreasonable to suppose that Congress intended to impose *respondeat superior* liability on a municipality for its employees' violations of Section 1981. Congress must be presumed to know the state of constitutional law and to expect that its statutes will be interpreted to avoid constitutional objections. *See NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979). At the time Congress enacted Section 1981, substantial questions existed concerning its authority to impose federal liability on municipalities for the acts of others. *See Monell v. Department of Social Services*, 436 U.S. at 669-683, 691-695. In fact, in 1866, just after the ratification of the Thirteenth Amendment, concerns about the issue of "dual sovereignty" were perhaps even more intense than in 1871, when the recently adopted Fourteenth Amendment provided an additional constitutional predicate for the imposition of obligations on state and municipal governments. *See* Cong. Globe, 39th Cong., 1st Sess. 1292-1293. In such circumstances, it cannot be pre-

[18] The contract cases that the NAACP/ACLU's brief cites (at 44-47) are irrelevant in light of this Court's holdings that Section 1981 is grounded in principles of tort, and not contract. *See Goodman v. Lukens Steel Co.*, 107 S. Ct. at 2621.

sumed that Congress—without so much as debating the issue—followed a course producing a form of liability believed to raise serious constitutional concerns.[19]

4. Jett finally suggests (Br. 29-31) that the civil rights policies underlying Section 1981 favor adoption of *respondeat superior* liability. This suggestion is also without merit.[20]

The policies underlying Section 1981 do not favor adoption of *respondeat superior* liability. This Court has held that those policies allow liability to be imposed only upon actors who have engaged in intentional race discrimination. *See General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. at 383-391. To hold an employer liable for all acts committed within the scope of

[19] None of the cases cited by the NAACP/ACLU (at 10-46) involved the imposition of federal duties on state officials; rather, they involved enforcement of state-created duties (or duties imposed by Congress on federally created entities). Thus, none of those cases implicated the "dual sovereignty" concerns that troubled Congress in the immediate post-Civil War period. Reliance on them is therefore misplaced.

[20] Jett's suggestion (at 27-29) that 42 U.S.C. § 1988 compels adoption of a *respondeat superior* standard—either by incorporation of state law or as an independent matter of federal law—ignores the contemporary constitutional concerns and, in all events, is totally unfounded. Section 1988 merely "instructs federal courts as to what law to apply in causes of action arising under federal civil rights acts." *Moor v. County of Alameda*, 411 U.S. 693, 703 (1973). It does not "authorize the wholesale importation into federal law of state causes of action—not even one purportedly designed for the protection of federal civil rights" (*id.* at 703-704) (footnote omitted). Nor does it "independently create[] a federal cause of action for the violation of federal civil rights" (*id.* at 704 n.17). This Court has therefore held that Section 1988 may not be used to create *respondeat superior* liability for municipalities in cases where, as here, Section 1983 applies, on the ground that "Congress did not intend, *as a matter of federal law*, to impose vicarious liability on municipalities for violations of federal civil rights by their employees" (*id.* at 710 n.27) (emphasis in original)). *See also Monell v. Department of Social Servs.*, 436 U.S. at 663-664 n.7 (reaffirming holding of *Moor*).

its employees' employment would be inconsistent with this intent requirement. If an employee is not carrying out a policy or custom of the employer, it cannot fairly be said that the employer actually intended the consequences of that employee's acts, whether or not the acts are within the scope of employment.[21]

Furthermore, *respondeat superior* liability is not necessary in order to vindicate the rights protected by Section 1981. Ample remedies exist. Both damages and injunctive relief may be obtained (as they were obtained here) against individuals who are responsible for discrimination. Similarly, damages and injunctive relief may be obtained against municipal employers where discrimination is pursuant to a policy or custom. And, for egregious incidents of discrimination committed under color of state law, criminal sanctions are available. In addition, there are the remedies for discrimination in employment set forth in Title VII. Thus, although *respondeat superior* liability against municipalities would provide an additional weapon to be used in the enforcement of Section 1981, it is not necessary in order to ensure that a remedy is available against every actor who can fairly be said to be responsible for unlawful discrimination. Congress's judgment that countervailing constitutional concerns outweighed the need for such an additional remedy should be respected.

[21] Of course, even if a "policy or custom" exists, liability does not necessarily follow. The trier of fact must also find that the "policy or custom" was motivated by racial animus. *See General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. at 383-391.

II. A POLICY OR CUSTOM SUFFICIENT TO IMPOSE LIABILITY ON A MUNICIPALITY UNDER SECTIONS 1981 AND 1983 DOES NOT EXIST WHERE, AS HERE, STATE LAW VESTS FINAL POLICYMAKING AUTHORITY IN PERSONS OTHER THAN THOSE WHO COMMITTED OR APPROVED THE DISCRIMINATORY ACTS IN QUESTION.

Although the court below properly held that the "policy or custom" limitation applied to both Jett's Section 1981 and Section 1983 claims, it apparently accepted the district court's judgment that Superintendent Wright had the requisite authority to establish a "policy or custom" (Pet. App. in No. 87-2084, at 21A-23A). Moreover, it remanded the case for trial, apparently on the issue whether Wright's decision was improperly motivated or made on the understanding that Principal Todd was so motivated (*id.* at 25A). These rulings were in error.

The Court has worked toward a clear standard concerning whether a "policy or custom" sufficient to justify imposition of municipal liability exists. Thus, in *City of St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988), Justice O'Connor, writing for a plurality of the Court, offered a comprehensive approach to the problem. Under that opinion (*id.* at 924) (emphasis in original), (1) "municipalities may be held liable under § 1983 only for acts for which the municipality is actually responsible, 'that is, acts which the municipality has officially sanctioned or ordered' "; (2) "only those municipal officials who have final policymaking authority may by their actions subject the government to § 1983 liability"; (3) "whether a particular official has 'final policymaking authority' is a question of *state law*"; and (4) the "challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business."

We urge the Court to follow the approach taken by Justice O'Connor in *Praprotnik*. That approach inquires whether the actions challenged have been undertaken pursuant to a grant of express or, in the case of "custom," *de facto* authority. The *Praprotnik* standard declines to impose liability on the basis of any theory of the employer's inherent authority to control (which, of course, is one theory underlying imposition of *respondeat superior* liability). And, critically, it leaves to state and local governments the identification of who shall be empowered to create—or to delegate the power to create—such authority. It thus ensures that municipalities will be held liable only for acts that may be deemed their own—and, accordingly, that the intent of the enacting Congress is respected.[22]

Applied to the facts of this case, the *Praprotnik* approach requires dismissal of the claims against the DISD under 42 U.S.C. §§ 1981 and 1983. Texas law specifies that policymaking authority for school districts is vested exclusively in the district's board of trustees. *See* Tex.

---

[22] By contrast, the proposal of the National Education Association ("NEA") in its *amicus* brief would ignore outright the congressional rejection of *respondeat superior* liability. NEA suggests (Br. 3-5, 10-12) that municipal liability should attach wherever the alleged wrongdoing is inherently an act of the municipality because it has been implicitly adopted or effectuated by the municipality. But all actions taken within the scope of an individual's employment are in this sense inherently acts of the municipality, because, by definition, the employee is the municipality's agent, and the law generally presumes that principals have control of their agents' actions. Therefore, the suggestion of the NEA equates to *respondeat superior* liability, which is precisely what the Court has found that Congress rejected. Thus, as NEA admits, its suggestion conflicts with this Court's interpretation of congressional intent in *Praprotnik*.

Also, the fact that only the DISD could restore Jett to his position as coach and athletic director simply does not mean that it has authorized the discrimination of which he complains. *See General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. at 397-401.

Code Ann., Education § 23.26(b) (Vernon 1987) ("the trustees shall have the exclusive power to manage and govern the public free schools of the [independent school] district."); *see generally* 51 Tex. Jur. 2d, *Schools* §§ 4, 10, 73 (1970) ("Local school trustees may adopt whatever reasonable rules and regulations are necessary for the control and management of the schools.") (citing, *e.g.*, *Wilson v. Abilene Independent School District*, 190 S.W.2d 406, 412 (Tex. Civ. App. 1945)). Moreover, the Texas courts have found that school superintendents lack any independent policymaking authority. *See Hinojosa v. State*, 648 S.W.2d 380, 386 (Tex. Ct. App. 1983) ("[T]he Education Code . . . gives the trustees the *exclusive* power to *manage* and *govern* the school district. The superintendent and his subordinates were but employees or agents of the trustees.") (emphasis in original); *Pena v. Rio Grande City Consolidated Independent School District*, 616 S.W.2d 658, 660 (Tex. Civ. App. 1981). Thus, neither Superintendent Wright's nor Principal Todd's actions are acts of a policymaker. Accordingly, those actions may not be deemed acts of the DISD.

It may be, as Jett asserts (Br. 31-32), that the DISD Board has delegated to Superintendent Wright the discretion to make transfer decisions for coaches and has not provided him with any policy guidance. That still would not subject the DISD to liability for any discriminatory actions by Wright. The DISD is entitled to assume that Wright will exercise his discretion consistent with the requirements of the law; and any failure by him to do so would not create a policy of discrimination on the DISD's part. *City of St. Louis v. Praprotnik*, 108 S. Ct. at 927. Because there is no suggestion that the DISD instructed Wright to make the transfer decision in a racially discriminatory manner, that the DISD knowingly concurred in or encouraged Todd's racially discriminatory recommendation, or that the DISD had a

custom or policy of racially discriminatory transfer decisions, the DISD cannot be held responsible for the decision challenged here. The remand ordered by the court below was thus in error (and, in any event, was not directed toward any legitimate inquiry under the *Praprotnik* approach).

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court below with respect to the issue raised in No. 87-2084, and reverse the judgment of the court below with respect to the issue raised in No. 88-214.

Respectfully submitted,

DONALD B. AYER
GLE[illegible]GER
ROB[illegible]WEENEY, JR.
JONES, [illegible] REAVIS & POGUE
1450 G Str[illegible]t, N.W.
Washington, D.C. 20005
(202) 879-3939
Of Counsel

BENNA RUTH SOLOMON *
JOYCE HOLMES BENJAMIN
BEATE BLOCH
STATE AND LOCAL
LEGAL CENTER
Suite 349
444 N. Capitol Street, N.W.
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for* Amici Curiae

February 3, 1989